(24,739)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 472.

CHARLES H. BAKER, ALGERNON S. NORTON, AND SEATTLE WATER FRONT REALTY COMPANY, APPELLANTS,

vs.

JOHN W. SCHOFIELD, AS RECEIVER OF THE MERCHANTS' NATIONAL BANK OF SEATTLE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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No. 2438

United States

Circuit Court of Appeals

For the Ninth Circuit.

CHARLES H. BAKER, ALGERNON S. NORTON, and SEATTLE WATER FRONT REALTY COMPANY, a Corporation,

Appellants,

vs.

JOHN W. SCHOFIELD, as Receiver of the MERCHANTS' NATIONAL BANK OF SEATTLE,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filmer Bros. Co. Print. 330 Jackson St., S. F., Cal.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1.

JOHN W. SCHOFIELD, as Receiver of MERCHANTS' NATIONAL BANK OF SEATTLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NORTON and SEATTLE WATER FRONT REALTY COMPANY, a Corporation,

Defendants.

Names and Addresses of Counsel.

FREDERICK BAUSMAN, Esq., Attorney for Plaintiff, 1408 Hoge Building, Seattle, Washington.

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W. C. MORROW, Esq., Attorney for Defendants, Bank of California Building, Tacoma, Washington.

H. C. BELT, Esq., Attorney for Defendants, 1002 Alaska Building, Seattle, Washington. [1*]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 1.

JOHN W. SCHOFIELD, as Receiver of MERCHANTS' NATIONAL BANK OF SEATTLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NORTON and SEATTLE WATER FRONT REALTY COMPANY, a Corporation,

Defendants.

Second Amended Bill of Complaint.

To the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division.

John W. Schofield of the City of Washington and citizen of the District of Columbia, brings this his bill against Charles H. Baker, a citizen and resident of the State of New York, Algernon S. Norton, a citizen and resident of the State of New York, and Seattle Water Front Realty Company, a corporation organized and existing under and by virtue of the

*Page-number appearing at foot of page of original certified Record.

laws of the State of Washington, and having its principal place of business at Seattle, in the State of Washington, and thereupon your orator complains and says:

FIRST.

By order and appointment of the Comptroller of the Currency of the United States, your orator is the duly appointed, qualified and acting Receiver of Merchants' National Bank of Seattle, Washington.

SECOND.

The said Merchants' National Bank of Seattle, [2] Washington, is, and was at all the times mentioned herein, a banking corporation organized and existing under and by virtue of the Acts of Congress of the United States relating to banking associations, and having its principal place of business at Seattle, in the Western District of Washington, Northern Division. On or about the 15th day of May, 1895, the Comptroller of the Currency of the United States became satisfied of the insolvency of said bank, and thereafter, after due examination of its affairs, did, on or about the 19th day of June, 1895, appoint defendant Charles H. Baker as receiver of said bank, and said defendant Baker thereupon accepted such appointment, and entered upon the performance of his duties as such receiver, and took possession of all the assets of said bank, and became and continued until April, 1899, the duly appointed, qualified, and acting receiver of said bank. In April, 1899, defendant Baker was compelled to resign, and did resign as such receiver, and the Comptroller of the Currency did thereupon appoint A. W. Frater as such receiver. On the 10th day of Feb-

ruary, 1913, A. W. Frater resigned as receiver of said Merchants' National Bank, and on the 12th day of February, 1913, your orator was by the Comptroller of the Currency of the United States appointed its receiver.

THIRD.

Among the assets which came into the hands of defendant Baker as receiver of said bank were certain lands in King County, in the State of Washington, which had been the property of said bank up to the time of his appointment as receiver. The bank, and defendant Baker as its receiver, had, under the laws of the State of Washington, a valuable preference right to purchase from the State of Washington [3] certain tide lands abutting thereon, comprising approximately twelve acres of ground, in King County, State of Washington, described and designated as Block 430 of Seattle Tide Lands, which tide lands are of great value, to wit, of the value of Three Hundred Thousand Dollars ($300,000.00).

FOURTH.

On the 13th day of February, 1897, and at all times thereafter, the preference right to purchase said tide lands was of substantial value, and on said date the Comptroller of the Currency did authorize defendant Baker, as receiver, to purchase said tide lands from the State of Washington. Baker, as such receiver, did thereafter enter into a contract with the State of Washington, for the purchase of the same, and paid to the State all or several installments of the purchase price thereof from the funds of said estate in his hands as such receiver,

and the State of Washington issued to the Merchants' National Bank of Seattle its contract of sale covering Block 430 of Seattle Tide Lands, situated in King County, Washington, which contract provided, under and in accordance with the laws of the State of Washington, that upon payment in full of the consideration named in said contract, the State of Washington would issue to the Merchants' National Bank of Seattle, or its assignee, its deed in fee simple to said tide lands; and thereafter said Baker, as receiver for said bank, held said contract of purchase as one of the assets of said insolvent bank.

FIFTH.

Thereafter, and while acting as receiver of said insolvent bank, the defendant Baker purported, on behalf of said bank, to convey and assign said contract of purchase to one Sol G. Simpson, and this he did without actual consideration. [4] This assignment was dated November 26, 1897, but was not executed and acknowledged until January 19, 1898. In order to conceal the assignment of said contract, and to disguise its real nature, defendant Baker, on the 6th day of October, 1897, petitioned the Circuit Court of the United States for the District of Washington, Northern Division, in vague and general terms, for leave to sell certain bad and doubtful "bills receivable, overdrafts, stocks, bonds, securities, warrants and claims due upon the assessment levied upon the stockholders of said bank" at private sale, and on said date the Judge of said court made an order purporting to authorize and empower defendant Baker to compromise, compound, or sell at private sale, "all assets of said insolvent bank which

are in his judgment bad and doubtful, consisting of bills receivable, judgments, overdrafts, stocks, bonds, warrants, securities, assessments upon the stockholders of said bank and other personal and chattel property and evidences of indebtedness; for cash, for such sum or sums as he, as such receiver, may be able to obtain, and as shall, in his judgment, be for the best interests of his said trust." Full and true copies of said petition and order are hereto annexed, marked Exhibits "A" and "B" respectively. The defendant Baker was, during 1897, an intimate friend of Sol G. Simpson, and did make use of said Simpson for the purpose of defrauding, and with the intent to defraud this estate of the tide land above described, to wit, Block 430 of Seattle Tide Lands, by a plan as follows: He arranged that Simpson should become the purchaser from himself, Baker, as receiver, of the right to purchase both Blocks 429 and 430, but with the secret agreement that Simpson should hold Block 430 for the use and benefit of defendant Baker as the real owner. This arrangement was carried out. [5] Simpson took over from defendant Baker both contracts, to wit, a contract for the purchase of Block 429 of Seattle Tide Lands, and the aforedescribed contract for the purchase of Block 430, and took the latter solely for the use and benefit of the defendant Baker, and subject to a secret trust, under the terms of which he agreed that he himself had and should have no interest in Block 430, but should, upon demand, transfer the same to defendant Baker or his nominee. The sale and assignment of said contract was made by said Baker as receiver to Simpson without any

other or valid order of court directing the same, and without any authority from the Comptroller of the Currency regarding it.

Said assignment to Simpson was made by Baker for Baker's own use, without the knowledge or consent of the Comptroller, and for the purpose of secretly defrauding said insolvent bank, its creditors and stockholders, and said Simpson, during all the time that he held, or purported to hold, title to said property, held the same in trust for said Baker, and subject to the control and direction of Baker. Defendant Baker, from time to time, advanced to and reimbursed Simpson such sums as were required to pay the balance of the purchase price remaining due the State.

SIXTH.

Under the laws of the State of Washington, by virtue of the ownership of said Block 430 by said bank, the bank was entitled to the preference right to lease certain harbor area abutting, adjacent and appurtenant to said Block 430. After the assignment of said contract covering Block 430 of Seattle Tide Lands by Baker to Simpson, said Baker secretly, and for the purpose of defrauding said bank, its creditors, and stockholders, caused the State of Washington [6] to issue its certain harbor area lease No. 181 in the name of S. G. Simpson, who at that time held the record ownership of said Block 430, and the State of Washington did thereupon duly issue its harbor lease No. 181 to S. G. Simpson, covering the harbor area appurtenant, abutting and adjacent to said Block 430. Said Simpson had no interest in said lease, but held the

same at all times thereafter and until August, 1905, in trust for Baker, and subject to the control and direction of Baker.

SEVENTH.

Defendant Algernon S. Norton was during all the times mentioned in this complaint defendant Baker's lawyer and intimate personal friend, and a resident of the State of New York. On August 11, 1905, and while said Simpson held said lease and the assignment of said contract for the sole benefit of the defendant Baker, said Baker, upon removing his residence from Seattle to New York, and upon the fatal illness of Simpson, and his removal to San Francisco, directed and caused Simpson and wife to convey, and they did convey, said contract of purchase and said lease to said Algernon S. Norton. Said lands, and the contract and lease covering the same, were to Simpson's knowledge on said date reasonably worth the sum of One Hundred Thousand Dollars. The assignment of the contract and lease from Simpson and wife to said Norton was nevertheless made without consideration and for the sole use and benefit of the defendant Baker, and the moneys necessary to make payment to the State were paid by him, but whether from funds held by him as such receiver and belonging to the estate of said insolvent bank, or from his own funds, plaintiff is unable to determine. These sums were in all the relatively insignificant sums [7] contracted for, from the State in the year 1897. The assignment from defendant Baker, as receiver, to Simpson was an instrument which, under the established practice of the community and of the Land Department of the

State of Washington, should be recorded in the office of the Commissioner of Public Lands at Olympia, Washington, and in the office of the County Auditor of the county in which said lands are situated, and was required by law to be recorded in the latter office, and in the absence of such recording, such assignment was and is, under the laws of the State of Washington, void and ineffective as against purchasers or assignees in good faith. Said assignment was never so recorded, but was withheld from record by the defendant Baker for the purpose of concealing his own fraudulent acquisition of the said properties.

EIGHTH.

Thereafter, on October 16, 1905, upon payment by said defendant Baker to the State of Washington of all amounts due under said contract, the defendant Baker caused the State of Washington to issue to said Norton its deed in fee simple covering all of said Block 430 of Seattle Tide Lands, except the following:

A strip of land 30 feet wide across Lots 1 to 9, inclusive, being 8 feet on the northerly side and 22 feet on the southerly side of the main tract of the Seattle & San Francisco Railway & Navigation Company, as the same is now constructed, and which is described as follows:

Beginning at a point on the west side of Block 430, from which the northwest corner of said block bears north 228.654 feet distant; thence in a northeasterly direction to a point on the east side of said block, from which the northeast corner bears north 262.963 feet distant; containing .40757 acres.

NINTH.

Said Norton had no interest of any nature whatsoever in said premises or said lease, but confederating with the [8] defendant Baker held the title to the same at all times for the sole and exclusive use of the defendant Baker, and subject to his direction and control, and delivered to Baker a written declaration of such trust, which instrument was by defendant Baker withheld from record for the purpose of concealing his claim of ownership of said property.

TENTH.

In August, 1907, the defendant Baker caused the incorporation, under the laws of the State of Washington, of the defendant Seattle Water Front Realty Company. This corporation was formed for the sole purpose of receiving title to said tide lands in furtherance of a fraudulent plan of defendant Baker to appropriate to himself, conceal and convert the assets of said insolvent bank, and to defeat the rights of its creditors and stockholders. Employees in the office of defendant Norton acted as dummy incorporators, under the direction of defendant Baker, and all the corporate records have always been kept in New York under Baker's control. Said defendant corporation was organized by defendant Baker with a purported capital stock of Two Hundred Fifty Thousand Dollars ($250,000.00), all of which stock was issued as fully paid and non-assessable in consideration of the transfer by Norton to it of the tide lands and the lease hereinbefore described. No other capital has gone into said corporation and no stock has been paid for except by the transfer of

said premises. The persons named as incorporators, trustees and officers of said company acted therein solely as agents and instruments of the defendant Baker and, as your orator is informed, believes, and charges the fact to be, no person except defendant Baker has now or has ever had any real interest in said company, either as stockholder or [9] otherwise, and said corporation is a sham designed by defendant Baker for the sole purpose of aiding him in the concealment and appropriation of the premises heretofore described in this bill, and in defrauding the creditors and stockholders of said insolvent bank. Upon the organization of the corporation its entire capital stock was at once issued in the name of defendant Norton, and all but five per cent thereof immediately transferred in blank to defendant Baker, who has ever since held the same, but, for the purpose of concealing his ownership thereof and his fraudulent claim to the property belonging to his former trust, defendant Baker has never taken any of said shares of stock in his own name, except one block of two hundred fifty shares, and the remainder are held for the benefit of defendant Baker as follows: 1975 shares in the name of defendant Norton, 250 shares in the name of Union Savings and Trust Company of Seattle, and twenty-five shares in the name of persons unknown. By direction of the defendant Baker the said Norton did, in the year 1907, convey to said Seattle Water Front Realty Company the lands and lease hereinbefore described, without actual consideration, but for the purported consideration of the issuance of the capital stock of said purported corporation.

ELEVENTH.

The tide lands and lease hereinbefore described are, and at all times have been, situated in the Western District of Washington, Northern Division. The shares of stock in defendant Seattle Water Front Realty Company are personal property and its location is where said corporation is incorporated and has it principal place of business, to wit, in Seattle, King County, Washington, in the Western District of Washington, Northern Division, and nowhere else, and such [10] has been the *locus* of the stock of said company at all times since its incorporation.

TWELFTH.

The facts herein alleged were wholly unknown to any of the creditors and stockholders of said bank, and to plaintiff and the Comptroller of the Currency until the year 1913, and were, until that time, concealed from them by the defendants, as above set forth, and were first discovered by the Comptroller of the Currency on or about the 1st day of February, 1913, and your orator has been directed by said Comptroller to commence and prosecute this suit. Plaintiff avers that he, as receiver of Merchants' National Bank of Seattle, Washington, is the owner of the tide lands and lease hereinbefore described; that no title thereto ever passed from defendant Baker as receiver of said insolvent bank to said Simpson, or from said Simpson to said Norton, and that by the conveyance of said premises by the State of Washington to said Norton the equitable title passed to the then acting and qualified receiver of said bank, and that any title acquired by Norton was held by him as trustee for the receiver of said Mer-

chants' National Bank, and is now held by Seattle Water Front Realty Company as trustee for plaintiff, and that defendants Baker and Seattle Water Front Realty Company did, at the time of the purported transfer of said premises to said corporation, know, and have at all times known all the facts hereinbefore stated in this bill of complaint, and knew that said premises belonged to the receiver of said bank and formed a part of the estate of said insolvent bank. [11]

All of which actions, doings and pretenses of said defendants are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of the plaintiff in the premises, in consideration whereof and forasmuch as the plaintiff is remediless in the premises at and by the strict rules of the common law and can only have full and adequate relief in a court of equity, where matters of this nature are properly commenceable and relievable.

And your orator prays that the defendants and each of them may be compelled to answer each and every allegation in this bill contained, as fully as if directly interrogated as to each, but not under oath, answers under oath being hereby expressly waived.

And your orator further prays that the defendants and each of them may be adjudged and decreed to hold said lands and lease, or such portion thereof as is now in their possession, or in possession of either of them, in trust for your orator, and to convey the same to your orator; and that said defendants may be restrained and enjoined from hereafter transferring said premises and lease, or any part thereof, to

any other person, and may be perpetually enjoined from setting up any claim of title to said land, or any part thereof, or in any manner intermeddling therewith, and your orator prays that it may be determined whether defendants, or either of them, have expended upon the property involved in this suit any funds other than the funds of the estate of Merchants' National Bank, and offers to pay to defendants any such funds which the Court may hold he should pay on receiving the relief herein sought, or as a condition of receiving such relief.

And your orator further prays that in case it shall be found upon the hearing of this cause that said premises [12] and lease, or any portion thereof, have been transferred so as to defeat the right, interest and title of plaintiff therein, that an accounting may be had, and that all stock in said corporation and all other considerations which defendant Baker may have received for or on account of the transfer of any interest in said premises may be declared to have been received, and to be held as trustee for the use and benefit of plaintiff herein, and the defendants and each of them be enjoined and restrained from selling or disposing of, or permitting the sale, transfer or disposal of, any stock in said defendant corporation until the final order of this Court, and in case said premises, or any part thereof, shall have been found to have been transferred so as to defeat the title of plaintiff thereto, that said defendants be required to pay, transfer and deliver to plaintiff all moneys, stocks, or other considerations which may have been received in consideration of such transfer, and that in such case plaintiff's equitable lien and

claim to said stock may be enforced, and that the incumbrance or cloud of defendants' claim thereto may be removed, and that an accounting may be taken under the direction of the Court for the loss occasioned by defendants' wrongful and fraudulent acts in relation to the premises and the breach of trust of defendant Baker; and for such other and further relief in the premises as the nature and circumstances of this case may require and to your Honors may seem meet. To the end that your orator may obtain the relief to which he is justly entitled in the premises, he now prays the Court to grant him due process by subpoena directed to the said Charles H. Baker, Algernon S. Norton, and Seattle Water Front Realty Company, a corporation, defendants hereinbefore named, requiring and commanding each of them to appear [13] herein and answer, but not under oath, the same being expressly waived, the several allegations in this bill contained.

DANIEL KELLEHER,
R. P. OLDHAM,
R. C. GROSSCUP,
Solicitors for Plaintiff.

United States of America,
Western District of Washington,
County of King,—ss.

Daniel Kelleher, being first duly sworn, on oath deposes and says:

I am one of the attorneys for the plaintiff in the above-entitled cause. I have read the foregoing bill of complaint and know the contents thereof. I have personal knowledge of the facts stated in this bill

and upon which relief is asked, and the same are true of my own knowledge, except as to the matters therein stated on information and belief, and as to these matters, I believe the same to be true.

DANIEL KELLEHER.

Subscribed and sworn to before me this 31st day of May, 1913.

[Seal] W. R. C. COCKE,

Notary Public in and for the State of Washington, Residing at Seattle. [14]

Exhibit "A" [to Second Amended Bill of Complaint]—Petition for Leave to Compromise or Sell Bad and Doubtful Assets.

In the Circuit Court of the United States for the District of Washington, Northern Division.

No. 515.

In the Matter of the Receivership of THE MERCHANTS' NATIONAL BANK OF SEATTLE.

Petition for Leave to Compromise or Sell Bad and Doubtful Assets.

The undersigned, your petitioner, respectfully represents and shows:

I.

That the Merchants' National Bank of Seattle, Washington, now is, and at all of the times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the National Bank Laws of the United States of America.

II.

That on about the 20th day of May, 1895, said

bank became insolvent and unable to pay its debts, and thereupon and on about the 19th day of June, 1895, your petitioner, Charles H. Baker, was by the Honorable James H. Eckles, Comptroller of the Currency of the United States, duly appointed receiver of the said bank, and thereupon duly filed his bond as such receiver and took the oath prescribed by law and entered upon the discharge of the duties of his said trust, and ever since has been, and now is the duly appointed, qualified and acting receiver of said Merchants' National Bank of Seattle.

III.

Your petitioner further represents and shows, that there is now in his hands as such receiver a large amount of assets of his said trust, consisting of bills receivable [15] overdrafts, stocks, bonds, securities, warrants and claims due upon the assessment levied upon the stockholders of said bank by order of the Comptroller of the Currency, together with other personal and chattel property and evidences of indebtedness, which your petitioner has, after exhausting all means of collection, been unable to realize upon, and which your petitioner is informed and believes are bad or doubtful assets.

IV.

Your petitioner further represents and shows that a considerable sum can be realized by compromising or compounding the same with the debtors, or by selling said assets at private sale, and your petitioner believes it to be for the best interests of his said trust, and all persons concerned therein, that said assets be so compromised and compounded, or sold at private sale as aforesaid.

V.

Your petitioner further represents and shows, that an examination of the affairs of said receivership has been made by a special bank examiner under the authority and direction of the Honorable James H. Eckels, Comptroller of the Currency, and that said Comptroller of the Currency has authorized and directed your petitioner to apply to this Honorable Court for an order authorizing and empowering your petitioner to compromise, compound, or sell at private sale all of the assets of his said trust for cash for such sum or sums as in his judgment is for the best interests of the creditors of his said trust.

Wherefore, your petitioner prays that this Honorable Court make an order authorizing and empowering him to compromise, compound, or sell at private sale all of the bad [16] and doubtful assets of the said Merchants' National Bank of Seattle, Washington, now in his hands as receiver as aforesaid, for cash for such sum or sums as in the judgment of your petitioner is for the best interests of his said trust and all persons concerned therein, and for such other and further order in the premises as to this Honorable Court may seem meet and proper.

Dated this 6th day of October, 1897.

CHARLES H. BAKER,

As Receiver of the Merchants' National Bank of Seattle.

United States of America,
State of Washington,
County of King,—ss.

Charles H. Baker, being first duly sworn, on oath says: That he is the petitioner named in the fore-

going petition. That he has heard the same read, knows the contents thereof and believes the same to be true.

CHARLES H. BAKER.

Subscribed and sworn to before me this 6th day of October, 1897.

[Notarial Seal] JOHN H. POWELL,
Notary Public in and for the State of Washington,
Residing at Seattle. [17]

Exhibit "B" [Order Granting Petition for Leave to Compromise or Sell Bad and Doubtful Assets].

In the Circuit Court of the United States for the District of Washington, Northern Division.

No. 515.

In the Matter of the Receivership of THE MERCHANTS' NATIONAL BANK OF SEATTLE.

Order.

At this time the above-entitled matter came on regularly to be heard upon the petition of Charles H. Baker, as receiver of said The Merchants' National Bank of Seattle, Washington, for leave to compromise, compound or sell at private sale, as in his judgment may be for the best interests of his said trust, all of the bad and doubtful assets of said bank, and the Court having heard the said petition, and being now fully advised in the premises, it is hereby

Ordered, adjudged and decreed that the receiver of the said Merchants' National Bank of Seattle, be, and he hereby is authorized and empowered to compromise, compound, or sell at private sale, all assets

of said insolvent bank which are in his judgment bad and doubtful, consisting of bills receivable, judgments, overdrafts, stocks, bonds, warrants, securities, assessments upon the stockholders of said bank and other personal and chattel property and evidences of indebtedness; for cash, for such sum or sums as he, as such receiver, may be able to obtain, and as shall, in his judgment, be for the best interests of his said trust. And said receiver is hereby authorized and empowered to make all necessary and proper assignments of transfers, and to do any other act or thing which may be necessary to fully carry out [18] the conditions and purposes of this order.

Done in open court this 6th day of October, A. D. 1897.

C. H. HANFORD,
Judge.

Copy of within Second Amended Bill received and due service thereof acknowledged this 31st day of May, 1913.

CORWIN S. SHANK,
H. C. BELT,
Attorneys for Norton and Seattle W. F. R. Co.

[Endorsed]: Second Amended Bill of Complaint. Filed in the U. S. District Court, Western Dist. of Washington. May 31, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [19]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 1.

JOHN W. SCHOFIELD, as Receiver of MERCHANTS' NATIONAL BANK OF SEATTLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NORTON, and SEATTLE WATER FRONT REALTY COMPANY, a Corporation,

Defendants.

Answer of Charles H. Baker to Second Amended Bill of Complaint.

Now comes Charles H. Baker, a citizen and resident of the State of New York, and for answer to the Second Amended Bill of Complaint says and alleges:

I.

This defendant has no knowledge or information sufficient on which to form a belief as to whether or not the Comptroller of the Currency appointed John W. Schofield, receiver of the Merchants' National Bank, or as to whether the said Comptroller had power or authority to make such an appointment, or as to whether said Schofield is in fact such receiver, or has authority to maintain this action. This defendant therefore demands strict proof pertaining to each and every allegation in the first paragraph of the bill.

II.

This defendant denies that in April, 1899, or at any other time, he was compelled to resign the receivership of the Merchants' National Bank. This defendant denies that he has any [20] knowledge or information as to whether or not A. W. Frater in February, 1913, or at any other time resigned as receiver of said Merchants' National Bank, and denies that he has any knowledge or information sufficient on which to form a belief as to whether or not John W. Schofield was appointed, or ever has been appointed receiver, and as to said allegations this defendant demands strict proof.

III.

This defendant denies that the Merchants' National Bank at the time of the appointment of this defendant as receiver had any preference right, and denies that at the time of, and after his appointment as receiver, he had any preference right or any right to purchase from the State of Washington for and in behalf of said bank, Tide Land Block 430, or any tide lands, and denies that the preference right to purchase said block or any tide lands was of the value of Three Hundred Thousand ($300,000) Dollars or any other sum. The right to assign the right to purchase said Tide Land Block was, under the law, limited in time and of merely nominal value, and this defendant realized out of the same, considering the nature and character of said right, more than its true value. Said claim was doubtful and speculative, and properly belonged to a class known as desperate, and said claim was so regarded by the Comptroller of the Currency, who understood the

full nature of the same.

IV.

This defendant denies that the preference right to purchase said tide land known as Block 430 was of substantial or any value, and denies that the said Comptroller had authority to authorize this defendant, as receiver, to purchase said tide land from the State of Washington, or to use or obligate the funds of his trust for that purpose. This defendant admits that he paid to the State of [21] Washington at the time of the issuance of the contract for the purchase of said block, one of ten equal installments of the purchase price thereof, and that the said amount was paid from the funds in his hands as receiver, and this defendant denies that he paid any further amount from said funds, and denies that he had any authority to use the funds of said bank for the purpose of paying for said block, and avers that he had no right to obligate his trust to future judgments; that thereafter, for the purpose of relieving himself from responsibility, he sold the contract between himself as receiver and the State of Washington, to Saul G. Simpson, and that Saul G. Simpson paid to him a sum of money therefor more than the amount he, as receiver, had taken out of the funds of said trust to pay the State of Washington, and that thereby said trust was fully reimbursed with a profit, and that said sale to Saul G. Simpson, and the circumstances under which said sale was made, and the reasons therefor were fully known to the Comptroller, and said Comptroller approved of the acceptance of the amount received from Saul G. Simpson as a full, complete and satis-

factory settlement of this defendant's relation to said transaction. This defendant denies that said contract or the law under which he was acting as receiver, or the Comptroller of the Currency, or any other authority would have enabled him or permitted him to use the funds of said trust to complete the contract with the State of Washington, and this defendant denies that he, as receiver, or in any other capacity, held the contract for the purchase of said Tide Land Block for his own use or benefit, after the sale to Saul G. Simpson, until after he purchased said block from Saul G. Simpson in the open market, which purchase was agreed upon in the spring of 1899 and finally consummated in 1905.

V.

This defendant admits that he assigned said contract [22] with the State of Washington for the purchase of said Tide Land Block 430 to Saul G. Simpson, but denies that said assignment was a purported assignment, or made in any capacity except in good faith for valuable consideration paid by said Saul G. Simpson, which consideration was turned in in full to the trust administered by this defendant. This defendant denies that he petitioned the Circuit Court of the United States for leave to sell certain property belonging to his trust for any purpose of concealment, but avers that his petition was made upon the advice of the Comptroller of the Currency, and by his direction, after due, thorough and complete examination of the assets of said trust made for and in behalf of said Comptroller by a duly appointed examiner, acting as the agent of said Comptroller. This defendant avers that his action in

making said petition and securing said order was in all respects in good faith and in pursuance of faithful administration of his trust, and in pursuance of the directions and control, and in pursuance of the advice of the Comptroller of the Currency, who had full knowledge of all the circumstances pertaining to said trust, and this defendant denies all inferences, innuendoes and allegations imputing to him in said transaction any purpose other than a full realization for and in behalf of said trust, of the value of the assets belonging thereto, including any contract said trust held relating to said tide lands. This defendant denies that he made use of Saul G. Simpson for the purpose or with the intent to defraud his trust of said Tide Land Block 430, or any other property, and denies that said Simpson became purchaser of said block in trust for this defendant, or for his use, or with the expectation that this defendant would acquire the ownership thereof, and denies that he had, while receiver, any agreement with said Simpson, secret or otherwise, by virtue of which this defendant was to become thereafter the owner of [23] said block, and that said Simpson held said block or the contract thereto, subject to a secret trust or any trust, and denies that under an agreement with said Saul G. Simpson, or at all, while receiver, this defendant was to have any interest in said contract or any of the lands described therein. This defendant denies that the sale of said contract to Simpson was made for the purpose of defrauding said insolvent bank or its creditors or stockholders, or that said Simpson, during the receivership of this defendant at any time held said property or said contract

for the use or benefit in any manner whatsoever, of this defendant. This defendant further denies that he from time to time, or at all, advanced to said Simpson or reimbursed said Simpson for sums paid by him to the State of Washington on account of the purchase price of said block.

VI.

This defendant denies that said Merchants' National Bank, or that he, as receiver, was ever entitled to preference right to lease any harbor area adjacent to said Block 430, and denies that he, secretly or at all, or for any fraudulent purpose, caused the State of Washington to issue a lease to said harbor area designated as No. 181, or any lease in the name of Saul G. Simpson, but states that said Saul G. Simpson leased said harbor area from the State of Washington for his own personal use and on his own behalf. This defendant denies that said Simpson had no interest in said lease and denies that said Simpson held the same at any time in trust for this defendant or subject to his control or direction.

VII.

This defendant denies that said Simpson ever held said lease or the assignment of said contract for the benefit of this defendant, and denies that he directed or caused Simpson and wife to convey or assign said contract or lease to defendant A. S. [24] Norton on account of the illness of said Simpson, but avers that said Simpson and wife assigned said contract and said lease to this defendant for a valuable consideration in the usual course of business after this defendant's termination of connection with said trust, and that no such understanding existed prior

to about the month of March, 1899, and that said assignment was not made in pursuance of any understanding existing prior to that date. This defendant denies that at the time of the purchase of said contract and lease from said Simpson the said property was worth One Hundred Thousand ($100,000) Dollars or any amount over and above the amount actually agreed to be paid for the same. This defendant denies that said contract and lease was assigned to the defendant Norton without consideration, but avers that said assignment was made for full and valuable consideration paid by this defendant to said Simpson from his own funds, and that the assignment was made to Norton at the instance and request of this defendant for the sole purpose of convenience. This defendant at the time was expecting to leave the United States for an indefinite period of time to engage in business in the Orient, and the contract was placed in the name of said Norton under an arrangement made between this defendant and Norton, so that Norton might be able in case of sale of said property to make good title to the same without delay. This defendant denies that said assignment was withheld from record for any purpose of concealment, but avers that following said assignment steps were immediately taken to secure the issuance of a deed from the State of Washington to the assignee Norton, and in the usual course of business said deed was issued to said Norton and placed on record.

VIII.

On or about October 16, 1905, the State of Washington [25] issued a deed covering said Tide Land

Block 430 to defendant Norton, excepting therefrom a strip about thirty (30) feet in width, and containing about four-tenths (4/10) of one acre covered by the right of way of the Seattle and San Francisco Railway and Navigation Company.

IX.

Said Norton, upon receiving the title to the said Tide Land Block 430 and said lease, executed and delivered to this defendant a declaration of trust showing that this defendant was the beneficial owner of said property, but said declaration was made without any purpose or intent to hide or conceal this defendant's connection with said property.

X.

The defendant corporation, Seattle Water Front Realty Company, was organized under the laws of the State of Washington, for the purpose of purchasing said Tide Land Block 430 and said lease, and for other purposes named in the Articles of Incorporation. This defendant denies that said corporation was formed in pursuance of fraudulent plan or any purpose of concealment or with any intent to convert the assets of the insolvent bank or to defeat the rights of any creditors or stockholders, and this defendant denies that the records of said corporation have been kept with any purpose of concealment or fraud, or for any purposes other than that of convenience. This defendant denies that no other capital has gone into said corporation, but avers that from time to time he and other stockholders have contributed to the maintenance of said property and to the payment of taxes thereon, and have in other ways incurred expenses in looking after said prop-

erty and preserving the same. This defendant denies that the persons named as incorporators, trustees and officers of said corporation have acted solely as the agents and [26] instruments of this defendant, but avers that all persons acting as officers and agents of said corporation have acted in behalf of said corporation, and this defendant denies that he is now or that he has at all times been the only person holding an interest in said company, but avers that other persons have held *bona fide* interests in said company by way of stock ownership, as is more fully set forth in the answer of the defendant Seattle Water Front Realty Company, the averments of which respecting stock ownership are hereby adopted and referred to by this defendant the same as if herein repeated, and this defendant denies that it has been the purpose of said corporation to in any way defraud, conceal from, or otherwise injure the creditors and stockholders of said insolvent bank, and this defendant avers that his interest in said corporation has at all times been open to all persons desiring knowledge concerning the same, and that as between himself and defendant Norton the said stock has stood on the books of said corporation in the name of Norton solely as a matter of convenience, but in truth and in fact this defendant has held the certificates for said stock, and has made no concealment of said holding.

XI.

This defendant admits that said property is located in the Western District of Washington and that the defendant corporation Seattle Water Front Realty Company is a corporation in the State of

Washington, having its principal place of business in Seattle.

XII.

Defendant denies that the purchase of said Tide Land Block 430 and said lease was made without the knowledge of the Comptroller of the Currency, and denies that the assignment of the same was made without the knowledge of the Comptroller of the [27] Currency, but avers that the Comptroller of the Currency had full knowledge of the situation both in law and fact relating to the claim of said insolvent bank to the right to purchase said land, and that all acts done and performed by this defendant pertaining to the same while this defendant remained receiver were with the full knowledge of said Comptroller and were done and performed with his approval. This defendant has no knowledge as to whether or not the complainant has been directed by the Comptroller to commence and prosecute this suit, but avers that this complainant had no right, either in law or fact, to commence this suit, and has no right to prosecute the same. This defendant denies that the complainant is the owner of said lands or lease described in the complaint. This defendant avers that complainant has no right or title to the said land or the said lease, either in law or equity, but avers that the sole title to the same is in the defendant Seattle Water Front Realty Company, and denies that said Seattle Water Front Realty Company holds said title as trustee or in any other manner except in fee simple, and for its own exclusive benefit and use, and this defendant denies that said Seattle Water Front Realty Company, its of-

ficers, agents and servants have ever had any knowledge of any claim or right adverse to its title. This defendant denies that he individually or as receiver has performed any act contrary to equity or good conscience, but avers that all of his acts while receiver were for the sole and exclusive benefit of his trust, and were performed in good faith and with the full knowledge of the officers of the United States having supervision of his trust.

This defendant avers that this suit is brought for the sole purpose of speculation since said land has become valuable; that up to the time of the final purchase of said land from the [28] State of Washington, said contract was a liability, and was without real value; that after S. G. Simpson had purchased the assignment of said contract he risked his own money in the purchase of said property from the State, and that at said time the Comptroller knew, and for a long time had known, that the said contract had been sold. The said trust realized by reason of the transactions of this defendant as receiver more than it could have otherwise realized, and all of the transactions of the defendant inured to the benefit of said trust, and not to its injury. The stockholders, creditors and others interested in said bank, and the officers having charge of said insolvent bank, having full knowledge of the facts relating to the transactions of this defendant as receiver, should be in equity estopped by their laches and by lapse of time from prosecuting this suit.

Wherefore this defendant asks that the title to said property be declared solely in the defendant Seattle Water Front Realty Company, and that a

decree be entered dismissing the bill and granting such affirmative relief as the defendants are entitled to in equity.

BENJAMIN S. GROSSCUP,
Attorney for Defendant Charles H. Baker.

Due service and copy of within Answer received this 15th day of July, 1913.

BAUSMAN & KELLEHER,
Attorneys for Plaintiff.

[Indorsed]: Answer of Charles Baker to Second Amended Bill of Complaint. Filed in the U. S. District Court, Western Dist. of Washington. July 15, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [29]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 1.

JOHN W. SCHOFIELD, as Receiver of MERCHANTS' NATIONAL BANK OF SEATTLE,
Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NORTON and SEATTLE WATER FRONT REALTY COMPANY, a Corporation,
Defendants.

Answer of Defendant Algernon S. Norton to Second Amended Bill of Complaint.

Comes now the defendant Algernon S. Norton and for answer to the second amended bill of complaint herein alleges:

FIRST.

This defendant has no knowledge whether or not by order and appointment of the Comptroller of the Currency the plaintiff is the duly or otherwise appointed, qualified and acting receiver of the Merchants' National Bank of Seattle, Washington.

SECOND.

This defendant has no knowledge whether or not the Merchants' National Bank of Seattle is or was at any of the times herein mentioned a banking corporation organized or existing under any act of Congress and having its principal place of business in Seattle, or elsewhere. This defendant has no knowledge whether or not on May 15, 1895, the Comptroller of [30] the Currency became satisfied of the insolvency of said bank, but admits that on or about June 19, 1895, the defendant Charles H. Baker was appointed receiver of a bank then known as the Merchants' National Bank of Seattle, and that he entered upon the performance of his duties as such receiver, and took possession of all of the assets of said bank, and became and continued until April, 1899, the duly appointed, qualified and acting receiver of said bank, but this defendant avers that during all of said times the said Baker acted in his capacity as receiver in all matters connected with said receivership under the specific orders and direccions of the Comptroller of the Currency. This defendant has no knowledge whether or not in April, 1899, the defendant Baker was compelled to resign, but admits that he did resign as receiver, and admits that thereupon A. W. Frater was appointed such receiver, but by whose authority and at whose instance this de-

fendant has no knowledge thereon. This defendant further has no knowledge whether or not on February 10, 1913, said Frater resigned as receiver, and whether or not on February 12, 1913, the plaintiff was by the Comptroller of the Currency or otherwise appointed receiver.

THIRD.

This defendant has no knowledge whether or not among the assets which came into the hands of the defendant Baker as receiver of said bank there were certain lands in King County, Washington, which had been the property of said bank up to the time of his appointment as receiver. This defendant denies that the bank and the defendant Baker as receiver, or either of them, had under the laws of the State of Washington a valuable preference right to purchase from the State of Washington [31] certain tide lands abutting upon any other lands, and particularly denies that such preference right extended to lands comprising approximately twelve acres of ground or any other amount of ground in the State of Washington, and particularly denies that such preference right extended to the purchase of the tract of land described and designated as block 430 of Seattle Tide Lands, but admits that said block 430 is at the present time of considerable value but denies that it is of the value of $300,000.

FOURTH.

This defendant denies that on February 13, 1897, and at all times thereafter or at any other time the preference right to purchase said tide lands was of a substantial value or any value to the said receiver, but has no knowledge whether or not on said date

the Comptroller of the Currency authorized the defendant Baker as receiver to purchase said tide lands from the State of Washington, but avers that if such authorization and direction were given, the same were without authority in law. This defendant admits that said Baker purporting to act as such receiver did thereafter enter into negotiations with the State of Washington for the purchase of said tide lands, but denies that any lawful contract was ever made with the State that could be enforced against or in behalf of the said receivership, and denies that the defendant Baker paid the State of Washington all or several installments of the purchase price thereof from the funds of said estate in his hands as such receiver, but admits that he did pay to the State of Washington one installment thereof, and thereupon the State of Washington issued what purported to be a contract, but denies that the same was a contract of sale covering block 430 of Seattle Tide Lands, and this defendant has no knowledge as [32] to what the provisions of said purported contract were with reference to the issuance of a deed in fee simple to said tide lands, or as to the other provisions of the said purported contract, but avers that whatever the provisions thereof may have been they were not enforcible in behalf of or against the said estate and the receivership thereof. This defendant denies that said Baker, as receiver of said bank, held said purported contract or could hold the same as one of the assets of said insolvent bank, and avers that under the acts of Congress and the authority vested in said Baker that he had no right whatsoever to negotiate and receive such a contract.

FIFTH.

This defendant admits that after the issuance of said purported contract with the State, and while Baker was acting as receiver of the said bank, he conveyed and assigned said purported contract of purchase to Sol G. Simpson, but denies that this assignment was made without actual consideration, and avers that said assignment was made for a valuable consideration in excess of the amount which he, Baker, as receiver had invested in said contract, and that said assignment was made only after the Comptroller of the Currency had sent a special representative or inspector to Seattle to investigate the assets of the said bank, and after the said inspector had reported thereon to the Comptroller of the Currency recommending that all of the property and assets of the said bank be disposed of and the said estate closed, which said recommendation was approved by the Comptroller of the Currency, and orders issued accordingly. This defendant admits that the assignment was dated November 26, 1897, and was not executed and acknowledged until January 19, 1898, but avers that the delay of [33] about fifty days was occasioned purely and simply by the routine of administration.

This defendant admits that on October 6, 1897, the said Baker petitioned the Circuit Court of the United States for the District of Washington, but denies that such petition was for the purpose of concealing the assignment of said contract and to disguise its real nature, and denies that said petition was in vague and general terms, but admits that the petition was for leave to sell certain bad and doubtful bills re-

ceivable, overdrafts, stocks, bonds, securities, warrants and claims due upon the assessments levied upon the stockholders of said bank, but avers that said petition contained also a further provision that there were certain other personal and chattel property and evidence of indebtedness upon which the receiver was unable to realize anything, and that he likewise regarded them as doubtful, and further avers that said petition was full and explicit, and that he asked to sell the same at private sale, and that on the same date the Judge of said court made an order not only purporting but in fact authorizing and empowering the said Baker to compromise, compound or sell at private sale all the assets of said insolvent bank which were in his judgment as receiver bad and doubtful, embracing among other things bills receivable, judgments, overdrafts, stocks, bonds, warrants, securities, assessments upon the stockholders of said bank and all other personal and chattel property and evidences of indebtedness, and that such order was to sell them for cash for such sum or sums as he as receiver might be able to obtain, and for such sum or sums as in his judgment as receiver would be for the best interests of said trust. This defendant has not compared the Exhibits "A" and "B" attached to said bill of complaint with the original, and therefore [34] has no knowledge as to whether they are exact copies thereof, but believes them to be, but requires proof thereof.

This defendant admits that during 1897, the defendant Baker was an intimate friend of Sol G. Simpson, but denies that he made use of Simpson

for the purpose of defrauding and with the intent of defrauding the said receivership of block 430 of Seattle Tide Lands, or of any other tide lands or property, or of defrauding or with intent to defraud any one whomsoever, but avers that the purchase made by Simpson was *bona fide* and for a valuable consideration and at a profit to the estate of a contract which the said Baker as receiver had no right or authority in law to acquire, hold and perfect, and this defendant denies that said Baker arranged with Simpson that he should become the purchaser from said receiver of the right to purchase blocks 431 and 430, or any property whatsoever, and denies that he had any secret agreement with Simpson that Simpson should hold said block 430 for the use and benefit of the defendant Baker as the real owner, or that he had any agreement with the said Simpson with reference thereto. This defendant denies that any prior arrangement was had with said Simpson or that any such arrangement was carried out. This defendant admits that Simpson took over from the defendant Baker both of said purported contracts for the purchase of blocks 430 and 429 of Seattle Tide Lands, and denies that Simpson took over such assignment of blocks 430 or 429 for the use and benefit of the defendant Baker, and denies that the same was subject to any secret or other trust, and denies that said Baker had any agreement with said Simpson that he, Simpson, should have no interest in block 430, but should upon demand transfer the same to the defendant Baker or his nominee, and denies absolutely any such arrangement, [35] secret or otherwise, or that said assignment to said Simpson

was other than *bona fide* for a valuable consideration and with the sole interest of the said receivership uppermost in his mind.

This defendant denies that the sale and assignment by Baker as receiver to Simpson was without a valid order of Court directing the same, and denies that the sale was without any authority from the Comptroller of the Currency regarding it, but, on the contrary, avers that said Baker was at all times acting under specific orders and directions from the Comptroller and with his advice regarding these specific matters. This defendant denies that said assignment to Simpson was made by Baker for Baker's own use, without the knowledge or consent of the Comptroller and for the purpose of secretly defrauding said insolvent bank, its creditors and stockholders, and denies that said Simpson during all of the time that he held the title to said property held the same in trust for said Baker and subject to the control and direction of Baker.

This defendant further denies that Baker from time to time advanced to said Simpson the sums that were paid by Simpson to the State of Washington, but avers that long after the said Baker ceased to act as receiver of said bank that he purchased from the said Simpson the said contract.

SIXTH.

This defendant denies that said bank by virtue of any ownership of any lands whatsoever or the said receiver by virtue of any rights which he lawfully had was entitled to the preference right to lease any harbor area abutting, adjacent [36] or appurtenant to said block 430. This defendant denies that

after the assignment of said purported contract covering block 430 of Seattle Tide Lands from Baker as receiver to Simpson, that said Baker secretly or otherwise, for the purpose of defrauding said bank, its creditors and stockholders, did in fact cause or procure the State of Washington to issue harbor area lease #181 in the name of Simpson, but admits that at the time said harbor area lease was issued said Simpson was not only the record owner but was in fact the owner of the contract covering block 430, and that the harbor area lease #181 was issued to said Simpson covering the harbor area appurtenant and adjacent to said block 430, but avers that the same was procured by said Simpson. This defendant denies that said Simpson had no interest in said lease, and denies that Simpson held the same after the issuance thereof and until August, 1905, or at all, in trust for Baker and subject to the control and direction of Baker.

SEVENTH.

This defendant admits that he was during all the times mentioned in this bill of complaint the defendant Baker's lawyer and intimate personal friend, and a resident of the State of New York. This defendant admits that on August 11, 1905, Simpson and wife conveyed said contract of purchase and said lease to him, and admits that said assignment was made for the sole benefit of the defendant Baker, but denies that the same was occasioned by any fatal illness of the said Simpson and his removal to San Francisco. This defendant avers that said assignment was made to him as a matter of convenient handling of the same because of the contemplated

absence from this country of the said Baker. This defendant [37] denies that the same was with any intent to secret or otherwise cover up any transaction whatsoever. This defendant has no knowledge as to whether Simpson knew the said property to be reasonably worth the sum of $100,000 or what his knowledge upon that subject was. This defendant admits that the assignment of the contract and lease from Simpson and wife to him was without consideration and for the sole use and benefit of the defendant Baker, and that the moneys necessary to make the payments to the State of Washington, which were thereafter made, were advanced by Baker, but denies that the funds so used by Baker belonged to the said insolvent bank, and avers that such payments were made more than six years after the said Baker had resigned from such receivership, and avers that they were made from his own private funds. This defendant denies that the sums so paid were relatively insignificant, and avers that the sums paid were a fair and proper valuation of said property at the time the same were made.

This defendant admits that as against innocent purchasers or assignees in good faith, it would have been necessary to make a proper record of said assignment with the commissioner of public lands at Olympia, Washington, and with the county auditor of King County, Washington, but denies that there was any such necessity existing in this particular transaction, and avers that very shortly after the said assignment the balance of the payments due the State of Washington were made by said Baker and a deed issued for said land, which said deed was

properly recorded. This defendant further avers that all of said transaction was conducted in the ordinary and usual course of such purchases. This defendant denies that the failure to record said assignment was for the purpose of concealing the fraudulent acquisition of said properties or any fraudulent design whatsoever. [38]

EIGHTH.

This defendant admits that on October 16, 1905, upon payment by defendant Baker to the State of Washington of all amounts due under said contract the defendant Baker caused the State of Washington to issue to this defendant his deed in fee simple covering all of said block 430 of Seattle Tide Lands, excepting a strip of land thirty feet in width across certain portions thereof containing .40757 acres.

NINTH.

This defendant admits that he had no interest of any nature whatsoever in said premises or said lease at the time he took title thereto from said Simpson, and that thereafter and until on or about April 7, 1906, he held title to the same at all times for the sole and exclusive use of the defendant Baker and subject to his direction and control, and that he delivered to Baker a written declaration of trust, but denies that he confederated with the defendant Baker, or that the declaration of trust was withheld from record for the purpose of concealing Baker's claim of ownership in said property, and denies that any other act which he did was for any unlawful or immoral purpose.

This defendant avers that on April 7, 1906, he, being seized in fee simple of the legal title to block

430 of Seattle Tide Lands, and being possessed of the legal title to harbor area lease #181, which was also held in trust for the defendant Baker, purchased and acquired from the defendant Baker, and the defendant Baker granted and conveyed to him the beneficial interest in an undivided .02 part or share of said lands, together with an undivided .02 interest in said lease; the beneficial interest in a .01 part or share of said [39] land and lease was so conveyed in consideration of the sum of $1000, for which sum he, on or about April 7, 1907, gave to the defendant Baker his promissory note which was thereafter and on or about January 28, 1909, paid, together with the accrued interest thereon; the beneficial interest in the other .01 part or share of said land and lease was so conveyed in consideration of services theretofore rendered and thereafter to be rendered by him in and about the holding and care and management of said tide lands, which services he has continued to render from time to time ever since. This defendant further avers that thereafter, and on or about October 3, 1906, he being seized in fee simple of the legal title to said land and lease as aforesaid purchased and acquired from the defendant Baker, and the defendant Baker granted and conveyed to him the beneficial interest in a further undivided .01 part or share of said land and lease in consideration of an assignment then made to the defendant Baker of an interest to the extent of $2,000 in certain claims and causes of action against the city of New York. This defendant avers that he was a purchaser of all of said beneficial interest in the said land and lease in good faith for a

valuable consideration, and without any knowledge or notice whatever of any or either of the pretended fraudulent acts and conspiracies in the bill of complaint alleged, or of any rights or claims of the Merchants' National Bank of Seattle, or the receiver of said bank.

TENTH.

This defendant denies that in August, 1907, the defendant Baker caused the incorporation of the defendant Seattle Water Front Realty Company, and avers on the contrary that the said incorporation was caused in the month of April, 1907, [40] by the joint desire and action of himself and the defendant Baker. This defendant denies that said corporation was formed for the sole purpose of receiving title to said tide lands, or that it was formed in furtherance of a fraudulent plan of the defendant Baker to appropriate to himself, conceal or convert the assets of said insolvent bank, or to defeat the rights of its creditors or stockholders, or for any other fraudulent purpose whatsoever. This defendant denies that the employees in his office acted as dummy incorporators, or acted at all under the direction of the defendant Baker, and denies that all the corporate records have always been kept in New York under defendant Baker's control, but admits that they have been there most of the time. This defendant avers that the said corporation was actually formed by Mr. George F. Meacham and Mr. Albert H. Beebe of Seattle, Washington. This defendant admits that said corporation was organized with the purported capital of $250,000, all of which was issued as fully paid and non-assessable, but this

defendant denies that all of said stock was issued in consideration of the transfer by him of the tide lands and lease mentioned in the bill of complaint, and avers that said stock was issued for the consideration hereinafter stated. This defendant denies that no capital other than said lands has gone into said corporation, and denies that no payment has been made to the corporation for any of its stock except by the transfer of the said premises, and this defendant avers that the facts in that regard are as herein stated. This defendant denies that the persons named as incorporators, trustees and officers of said company, or any of them, acted other than solely and as the agents and instruments of the defendant Baker, and avers that they acted on behalf of said corporation and of its stockholders. This [41] defendant denies that no person excepting the defendant Baker is now or ever has had any real interest in said company either as a stockholder, or otherwise. This defendant denies that said corporation is a sham designed by the defendant Baker for the purpose of aiding him in the concealment and appropriation of the premises described in said bill of complaint, or that it was designed to be used in defrauding the creditors and stockholders of said insolvent bank, or that it was organized for any other purpose than lawful and legitimate purposes.

This defendant admits that upon the organization of the corporation its entire capital stock was at once issued in his name, and all but 5% thereof immediately transferred in blank to defendant Baker, but denies that the defendant Baker has ever since held the same, and denies that he has held any thereof

for the purpose of concealing his ownership or any fraudulent claim to the property in the complaint mentioned, and denies that the defendant Baker has never taken any of said shares of stock in his own name excepting one block of 250 shares, and except as hereinafter specifically admitted this defendant denies that said stock is entirely held—1975 shares in his name, 250 shares in the name of Union Savings and Trust Company, and 25 shares in the name of unknown persons.

This defendant denies that by direction of the defendant Baker, he did in 1907 convey to said defendant Seattle Water Front Realty Company the land and lease hereinbefore described, but admits that such conveyance was in fact made but denies that the same was without actual consideration, but admits that the conveyance was in addition to other consideration in consideration of the issuance of the capital stock of said corporation, which constituted the chief consideration [42] for said conveyance.

This defendant avers that on or about April 26, 1907, four shares of the capital stock of said company were issued for a valuable consideration to George F. Meacham of Seattle, who is the owner and holder thereof; that on or about the same date one share of the capital stock of said corporation was issued for a valuable consideration to Albert H. Beebe of Seattle, Washington, who is the owner and holder thereof; that on or about the same date one share of the capital stock of said corporation was issued to Henry J. Sondheim of New York City, who on September 15, 1908, transferred the said share to

Percival H. Gregory, who is the holder thereof, the defendant Baker being the owner; that on or about the same date one share of the capital stock of said corporation was issued to Frank Cummings of Preble, New York, who is the holder thereof, the defendant Baker being the owner; that on or about the same date seventy-five shares of the capital stock of said corporation were issued to him, the said shares representing and being issued in consideration of his undivided interest in the said lands and lease hereinbefore mentioned, and he is now the owner and holder of said shares; that on or about the same date twenty-four hundred and eighteen shares of the capital stock of the said corporation were issued to him as the nominee of the defendant Baker, and he thereupon assigned and delivered the certificates for the said twenty-four hundred and eighteen shares to the defendant Baker, said shares representing and being issued in consideration for his undivided interest in said lands and lease hereinbefore mentioned. That on June 14, 1907, the defendant Baker transferred for a valuable consideration ten shares of the capital stock of said corporation to May L. Norton of Suffern, New York, who is the owner and holder thereof. That on the same date the defendant Baker transferred to this defendant twenty-five shares of the capital stock of [43] said corporation in consideration of legal services theretofore rendered by him to the defendant Baker, which services had theretofore been agreed upon between him and Baker as $1250.00 and he is the owner and holder of said shares. That on July 25,

1907, the defendant Baker transferred two hundred and fifty shares of the capital stock of said corporation for a valuable consideration to the Union Savings & Trust Company of Seattle, Washington, which is now the owner and holder of said shares. That on January 17, 1908, the defendant Baker transferred five shares of the capital stock of said corporation to Clay Harding of the city of New York, said transfer being for a valuable consideration, and said Harding is now the owner and holder of said shares. That on January 17, 1908, the defendant Baker transferred for a valuable consideration five shares of the capital stock of said corporation to Louisa Buchanan of Tulalip, Washington, who is the owner and holder of said shares. That on February 4, 1908, the defendant Baker transferred for a valuable consideration five shares of the capital stock of said corporation to Irene Hoffman of New Albany, Indiana, who is the owner and holder of said shares. That on February 4, 1908, the defendant Baker for a valuable consideration transferred five shares of the capital stock of said corporation to Pauline Hoffman of New Albany, Indiana, who is the owner and holder of said shares. That on December 22, 1909, for a valuable consideration the defendant Baker transferred twenty-four shares of the capital stock of said corporation to Irene Russell Washburn of Nashville, Tennessee, who is now the owner and holder of said shares. That on July 29, 1910, the defendant Baker transferred to this defendant twenty-five shares of the capital stock of said corporation in consideration of legal services theretofore

rendered, which services had been agreed upon by the defendant Baker and himself as $1250, and he is now the owner and holder of said shares. That on [44] October 2, 1911, for a valuable consideration he transferred five shares of the capital stock of said corporation to Charles L. Downs of the city of New York, who is now the owner and holder of said shares.

ELEVENTH.

This defendant admits that the tide lands and lease hereinbefore described are and at all times have been situated in the Western District of Washington, and also admits that the shares of stock in said defendant Seattle Water Front Realty Company are personal property and its location is where said corporation is incorporated and has its principal place of business, which is in Seattle, Washington, and nowhere else, and such has been the *locus* of the stock of said company at all times since the incorporation of said Seattle Water Front Realty Company.

TWELFTH.

This defendant denies that the alleged facts set forth in the said bill were wholly unknown to any of the creditors and stockholders of the said bank, and to the plaintiff and to the comptroller of the currency until the year 1913, and denies that they were until that time concealed from them by the defendants as in said bill set forth, or otherwise, and denies that the proceedings in said receivership and the acts and doings of the said Baker as receiver were first discovered by the comptroller of the currency on or

about February 1, 1913.

This defendant has no knowledge whether or not the plaintiff has been directed by the comptroller of the currency to commence and prosecute this suit.

This defendant avers that all facts in said bill of complaint set forth, and all matters connected with said receivership, [45] and all dealings with reference to the said block 430 of Seattle Tide Lands and of the harbor area lease adjacent thereto and the method of handling the same, were matters known to the Comptroller of the Currency and were conducted under and pursuant to his advice and direction; in addition to which the same were matters of public record open to the world, and the same state of facts which now exist and form the basis of the allegations of said bill of complaint have existed at all times since the Merchants' National Bank of Seattle was placed in the hands of a receiver, and could and would have been discovered and made known to anyone investigating the same, or investigating or inquiring into the doings and affairs of said receivership. This defendant further avers that by reason of these facts the plaintiff is guilty of laches and is also estopped from setting up or asserting said allegations as a lawful basis for an action at law or in equity against the defendants, or either of them, or against the various stockholders of the Seattle Water Front Realty Company.

This defendant denies that the plaintiff, as receiver of the Merchants' National Bank of Seattle, is the owner of the tide lands and lease in said bill of complaint described. This defendant denies that

no title thereto has passed from the defendant Baker as receiver of said insolvent bank to said Simpson, or from said Simpson to this defendant, and further denies that by the conveyance of the said premises by the State of Washington to this defendant the equitable title, or any title, passed to the then acting receiver of said bank, and denies that the title acquired by him was held by him as trustee for the receiver of the Merchants' National Bank of Seattle, and denies that it is now held by the Seattle Water Front Realty Company as trustee for the plaintiff, or for any other person whomsoever other than the stockholders of said company, and denies [46] that the defendant Baker and the Seattle Water Front Realty Company have known of any state of facts whether those alleged in the said bill of complaint, or otherwise, that said premises belong to the receiver of said bank and form a part of the estate of said insolvent bank.

This defendant denies that the actions, doings and pretenses of this defendant, or of either of the defendants, are contrary to equity and good conscience, and tend to wrong, injure or oppress the plaintiff or any other person whomsoever.

WHEREFORE this defendant prays that the bill of complaint be dismissed and that he go hence with his costs and disbursements.

CORWIN S. SHANK,
HORATIO C. BELT,
Attorneys for Defendant Algernon S. Norton.

Service of the within Answer of Algernon S. Norton is hereby admitted this 15th day of July, 1913.

DAN'L KELLEHER,
R. P. OLDHAM,
R. C. GOODALE,
Attorneys for Plaintiff.

[Indorsed]: Answer of Defendant Algernon S. Norton to Second Amended Bill of Complaint. Filed in the U. S. District Court, Western Dist. of Washington. July 16, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [47]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 1.

JOHN A. SCHOFIELD, as Receiver of MERCHANTS' NATIONAL BANK OF SEATTLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NORTON and SEATTLE WATER FRONT REALTY COMPANY, a Corporation,

Defendants.

Amended Answer of Defendant Seattle Water Front Realty Company, a Corporation, to Second Amended Bill of Complaint.

Comes now the defendant Seattle Water Front Realty Company, a corporation, and for answer to the second amended bill of complaint herein alleges:

FIRST.

This defendant has no knowledge whether or not by order or appointment of the Comptroller of the Currency the plaintiff is the duly or otherwise appointed, qualified or acting receiver of the Merchants' National Bank of Seattle, Washington.

SECOND.

This defendant has no knowledge whether or not the Merchants' National Bank of Seattle is or was at any time herein mentioned a banking corporation organized or existing under any act of Congress or having its principal place of business in Seattle, or elsewhere. This defendant has no knowledge whether or not on May 15, 1895, the Comptroller of [48] the Currency became satisfied of the insolvency of said bank, but admits that on or about June 19, 1895, the defendant Charles H. Baker was appointed receiver of a bank then known as the Merchants' National Bank of Seattle, and that he entered upon the performance of his duties as such receiver, and took possession of all of the assets of said bank, and became and continued until April, 1899, the duly appointed, qualified and acting receiver of said bank, but this defendant avers that during all of said times the said Baker acted in his capacity as receiver in all matters connected with said receivership under the specific orders and directions of the Comptroller of the Currency and the United States Circuit Court. This defendant has no knowledge whether or not in April, 1899, the defendant Baker was compelled to resign, but admits that he did resign as receiver, and admits that there-

upon A. W. Frater was appointed such receiver, but by whose authority or at whose instance this defendant has no knowledge thereon. This defendant further has no knowledge whether or not on February 10, 1913, said Frater resigned as receiver, or whether or not on February 12, 1913, the plaintiff was by the Comptroller of the Currency or otherwise appointed receiver.

THIRD.

This defendant has no knowledge whether or not among the assets which came into the hands of the defendant Baker as receiver of said bank there were certain lands in King County, Washington, which had been the property of said bank up to the time of his appointment as receiver. This defendant denies that the bank or the defendant Baker as receiver, or either of them, had under the laws of the State of Washington a valuable preference right to purchase from the State of Washington [49] certain tide lands abutting upon any other lands, and particularly denies that such preference right extended to lands comprising approximately twelve acres of ground or any other amount of ground in the State of Washington, and particularly denies that such preference right extended to the purchase of the tract of land described and designated as block 430 of Seattle Tide Lands, but admits that said block 430 is at the present time of considerable value but denies that it is of the value of $300,000.

FOURTH.

This defendant denies that on February 13, 1897, or at any time thereafter the preference right to

purchase said tide lands was of a substantial value or any value to the said receiver, but has no knowledge whether or not on said date the Comptroller of the Currency authorized the defendant Baker as receiver to purchase said tide lands from the State of Washington, but avers that if such authorization or direction were given, the same were without authority of law. This defendant admits that said Baker purporting to act as such receiver did thereafter enter into negotiations with the State of Washington for the purchase of said tide lands, but denies that any lawful contract was ever made with the State that could be enforced against or in behalf of the said receivership, and denies that the defendant Baker paid the State of Washington all or several installments of the purchase price thereof from the funds of said estate in his hands as such receiver, but admits that he did pay to the State of Washington one installment thereof, and thereupon the State of Washington issued what purported to be a contract, but denies that the same was a contract of sale covering block 430 of Seattle Tide Lands, and this defendant has no knowledge as to what the provisions of said purported contract [50] were with reference to the issuance of a deed in fee simple to said tide lands, or as to the other provisions of the said purported contract, and avers that whatever the provisions thereof may have been they were not enforceable in behalf of or against the said estate or the receivership thereof. This defendant denies that said Baker, as receiver of said bank, held said purported contract or could hold the same as one

of the assets of said insolvent bank, but avers that under the acts of Congress and the authoritv vested in said Baker that he had no right whatsoever to negotiate and receive such a contract.

FIFTH.

This defendant admits that after the issuance of said purported contract with the State, and while Baker was acting as receiver of the said bank, he conveyed and assigned said purported contract of purchase to Sol G. Simpson, but denies that this assignment was made without actual consideration, and avers that said assignment was made for a valuable consideration in excess of the amount which he, Baker, as receiver had invested in said contract, and that said assignment was made only after the Comptroller of the Currency had sent a special representative or inspector to Seattle to investigate the assets of the said bank, and after the said inspector had reported thereon to the Comptroller of the Currency recommending that all of the property and assets of the said bank be disposed of and the said estate closed, which said recommendation was approved by the Comptroller of the Currency, and orders issued accordingly. This defendant admits that the assignment was dated November 26, 1897, and was not executed and acknowledged until January 19, 1898, but avers that the delay of about fifty days was occasioned purely and simply by the routine of administration. [51]

This defendant admits that on October 6, 1897, the said Baker petitioned the Circuit Court of the United States for the District of Washington, but

denies that such petition was for the purpose of concealing the assignment of said contract or to disguise its real nature, and denies that said petition was in vague or general terms, but admits that the petition was for leave to sell certain bad and doubtful bills receivable, overdrafts, stocks, bonds, securities, warrants and claims due upon the assessments levied upon the stockholders of said bank, but avers that said petition contained also a further provision that there were certain other personal and chattel property and evidences of indebtedness upon which the receiver was unable to realize anything, and that he likewise regarded them as doubtful, and further avers that said petition was full and explicit, and that he asked to sell the same at private sale, and that on the same date the Judge of said court made an order not only purporting but in fact authorizing and empowering the said Baker to compromise, compound or sell at private sale all the assets of said insolvent bank which were in his judgment as receiver bad and doubtful, embracing among other things bills receivable, judgments, overdrafts, stocks, bonds, warrants, securities, assessments upon the stockholders of said bank and all other personal and chattel property and evidences of indebtedness, and that such order was to sell them for cash for such sum or sums as he as receiver might be able to obtain, and for such sum or sums as in his judgment as receiver would be for the best interests of said trust. This defendant has not compared the Exhibits "A" and "B" attached to said bill of complaint with the original and therefore has no knowledge as to whether they are exact copies thereof, but believes

them to be, but requires proof thereof. [52]

This defendant admits that during 1897, the defendant Baker was an intimate friend of Sol. G. Simpson, but denies that he made use of Simpson for the purpose of defrauding, or with the intent of defrauding, the said receivership of block 430 of Seattle Tide Lands, or of any other tide lands or property, or of defrauding, or with intent to defraud, anyone whomsoever, but avers that the purchase made by Simpson was *bona fide* and for a valuable consideration and at a profit to the estate of a contract which the said Baker, as receiver, has no right or authority in law to acquire, hold and perfect, and this defendant denies that said Baker arranged with Simpson that he should become the purchaser from said receiver of the right to purchase blocks 429 and 430, or any property whatsoever, and denies that he had any secret agreement with Simpson that Simpson should hold said block 430 for the use or benefit of the defendant Baker as the real owner, or that he had any agreement with the said Simpson with reference thereto. This defendant denies that any prior arrangement was had with said Simpson or that any such arrangement was carried out. This defendant admits that Simpson took over from the defendant Baker both of said purported contracts for the purchase of blocks 430 and 429 of Seattle Tide Lands, and denies that Simpson took over such assignment of blocks 430 or 429 for the use or benefit of the defendant Baker, and denies that the same was subject to any secret or other trust, and denies that Baker had any agreement with said Simpson that he, Simpson, should have no interest in block

430, but should upon demand transfer the same to the defendant Baker or his nominee, and denies absolutely any such arrangement, secret or otherwise, or that said assignment to said Simpson was other than *bona fide* for a valuable consideration and with [53] the sole interest of the said receivership uppermost in his mind.

This defendant denies that the sale and assignment by Baker, as receiver, to Simpson was without a valid order of Court directing the same, and denies that the sale was without any authority from the Comptroller of the Currency regarding it, but, on the contrary, avers that said Baker was at all times acting under specific orders and directions from the Comptroller and with his advice regarding these specific matters. This defendant denies that said assignment to Simpson was made by Baker for Baker's own use without the knowledge or consent of the Comptroller and for the purpose of secretly defrauding said insolvent bank, its creditors and stockholders, and denies that said Simpson during all of the time that he held the title to said property held the same in trust for said Baker and subject to the control and direction of Baker.

This defendant further denies that said Baker from time to time advanced to said Simpson the sums that were paid by Simpson to the State of Washington, but avers that long after the said Baker ceased to act as receiver of said bank that he purchased from the said Simpson the said contract.

SIXTH.

This defendant denies that said bank by virtue of any ownership of any lands whatsoever, or the

said receiver by virtue of any rights which he lawfully had was entitled to the preference right to lease any harbor area abutting, adjacent or appurtenant to said block 430. This defendant denies that after the assignment of said purported contract covering block 430 of Seattle Tide Lands from Baker as receiver to Simpson, that said Baker secretly or otherwise for the purpose of defrauding said bank, its creditors and stockholders, [54] did in fact cause or procure the State of Washington to issue harbor area lease #181 in the name of Simpson, but admits that at the time the said harbor area lease was issued said Simpson was not only the record owner but was in fact the owner of the contract covering block 430, and that the harbor area lease #181 was issued to said Simpson covering the harbor area appurtenant and adjacent to said block 430, but avers that the same was procured by said Simpson. This defendant denies that said Simpson had no interest in said lease, and denies that Simpson held the same after the issuance thereof and until August 1905, or at all, in trust for Baker and subject to the control and direction of Baker.

SEVENTH.

This defendant admits that Algernon S. Norton was during all the times mentioned in this bill of complaint the defendant Baker's lawyer and intimate personal friend, and a resident of the State of New York. This defendant admits that on August 11, 1905, Simpson and wife conveyed said contract of purchase and said lease to Norton, and admits that said assignment was made for the sole benefit of the defendant Baker, but denies that the same was

occasioned by any fatal illness of the said Simpson and his removal to San Francisco. This defendant avers that said assignment was made to said Norton as a matter of convenient handling of the same because of the contemplated absence from this country of the said Baker. This defendant denies that the same was with any intent to secrete or otherwise cover up any transaction whatsoever. This defendant has no knowledge as to whether Simpson knew the said property to be reasonably worth the sum of $100,000, or what his knowledge upon that subject was. This defendant denies that the assignment of the contract and lease from Simpson and wife to Norton [55] was without consideration, but admits that it was for the sole use and benefit of the defendant Baker, and that the moneys necessary to make the payments to the State of Washington, which were thereafter made, were advanced by Baker, but denies that the funds so used by Baker belonged to the said insolvent bank, and avers that such payments were made more than six years after the said Baker had resigned from such receivership, and avers that they were made from his own private funds. This defendant denies that the sums so paid were relatively insignificant, and avers that the sums paid were a fair and proper valuation of said property at the time the same were made.

This defendant admits that as against innocent purchasers or assignees in good faith, it would have been necessary to make a proper record of said assignment with the commissioner of public lands at Olympia, Washington, and with the county auditor of King County, Washington, but denies that there

was any such necessity existing in this particular transaction, and avers that very shortly after the said assignment the balance of the payments due the State of Washington were made by said Baker and a deed issued for said land, which said deed was properly recorded. This defendant further avers that all of said transaction was conducted in the ordinary and usual course of such purchases. This defendant denies that the failure to record said assignment was for the purpose of concealing the fraudulent acquisition of said properties or any fraudulent design whatsoever.

EIGHTH.

This defendant admits that on October 16, 1905, upon payment by defendant Baker to the State of Washington of all amounts due under said contract, the defendant Baker caused the State of Washington to issue to said Norton its deed in [56] fee simple covering all of said block 430 of Seattle Tide Lands, excepting a strip of land thirty feet in width across certain portions thereof containing .40757 acres.

NINTH.

This defendant admits that said Norton had no interest of any nature whatsoever in said premises or said lease at the time he took title thereto from said Simpson, and that thereafter and until on or about April 7, 1906, he held title to the same at all times for the sole and exclusive use of the defendant Baker and subject to his direction and control, and that he delivered to Baker a written declaration of trust, but denies that he confederated with the defendant Baker, or that the declaration of trust was

withheld from record for the purpose of concealing Baker's claim of ownership in said property, and denies that any other act which he did was for any unlawful or immoral purpose.

This defendant avers that on April 7, 1906, the defendant Norton being seized in fee simple of the legal title to block 430 of Seattle Tide Lands, and being possessed of the legal title to harbor area lease #181, which was also held in trust for the defendant Baker, purchased and acquired from the defendant Baker, and the defendant Baker granted and conveyed to the defendant Norton the beneficial interest in an undivided .02 part or share of said lands, together with an undivided .02 interest in said lease; the beneficial interest in a .01 part or share of said land and lease was so conveyed in consideration of the sum of $1,000.00, for which sum the defendant Norton on or about April 7, 1906, gave to the defendant Baker his promissory note which was thereafter and on or about January 28, 1909, paid, together with the accrued interest thereon; the beneficial interest in the other .01 part or share [57] of said land and lease was so conveyed in consideration of services theretofore rendered and thereafter to be rendered by the defendant Norton in and about the holding and care and management of said tide lands, which services the defendant Norton has continued to render from time to time ever since. This defendant further avers that thereafter and on or about October 3, 1906, the defendant Norton being seized in fee simple of the legal title to said land and lease as aforesaid purchased and acquired from the defendant Baker, and the defendant Baker

granted and conveyed to the defendant Norton the beneficial interest in a further undivided .01 part or share of said land and lease in consideration of an assignment then made to the defendant Baker of an interest to the extent of $2,000 in certain claims and causes of action against the city of New York. This defendant avers that the defendant Norton was a purchaser of all of said beneficial interest in the said land and lease in good faith for a valuable consideration, and without any knowledge or notice whatever of any or either of the pretended fraudulent acts and conspiracies in the bill of complaint alleged, or of any rights or claims of the Merchants' National Bank of Seattle, or the receiver of said bank.

TENTH.

This defendant denies that in August, 1907, the defendant Baker caused the incorporation of the defendant Seattle Water Front Realty Company, and avers, on the contrary, that the said incorporation was caused in the month of April, 1907, by the joint desire and action of the defendant Norton and the defendant Baker. This defendant denies that said corporation was formed for the sole purpose of receiving title to said tide lands, or that it was formed in furtherance of a fraudulent plan of the defendant Baker to appropriate to himself, [58] conceal or convert the assets of said insolvent bank, or to defeat the rights of its creditors or stockholders, or for any other fraudulent purpose whatsoever. This defendant denies that the employees in the office of the defendant Norton acted as dummy incorporators, or acted at all under the direction of the defendant Baker, and denies that all the corporate records have

always been kept in New York under the defendant Baker's control, but admits that they have been there most of the time. This defendant avers that the said corporation was actually formed by Mr. George F. Meacham and Mr. Albert H. Beebe of Seattle, Washington. This defendant admits that said corporation was organized with the purported capital of $250,000, all of which was issued as fully paid and non-assessable, but this defendant denies that all of said stock was issued in consideration of the transfer by the defendant Norton to it of the tide lands and lease mentioned in the bill of complaint, and avers that said stock was issued for the consideration hereinafter stated. This defendant denies that no capital other than said lands has gone into said corporation, and denies that no payment has been made to the corporation for any of its stock except by the transfer of the said premises, and this defendant avers that the facts in that regard are as herein stated. This defendant denies that the persons named as incorporators, trustees, and officers of said company, or any of them, acted solely as the agents and instruments of the defendant Baker, and avers that they acted on behalf of said corporation and of its stockholders. This defendant denies that no person excepting the defendant Baker is now or ever has had any real interest in said company either as a stockholder or otherwise. This defendant denies that said corporation is a sham designed by the defendant Baker for the purpose of aiding him [59] in the concealment and appropriation of the premises described in said bill of complaint, or that it was designed to be used in defrauding the creditors and

stockholders of said insolvent bank, or that it was organized for any other purpose than lawful and legitimate purposes.

This defendant admits that upon the organization of the corporation its entire capital stock was at once issued in the name of the defendant Norton, and all but 5% thereof immediately transferred in blank to defendant Baker, but denies that the defendant Baker has ever since held the same, and denies that he has held any thereof for the purpose of concealing his ownership or any fraudulent claim to the property in the complaint mentioned, and denies that the defendant Baker has never taken any of said shares of stock in his own name except one block of 250 shares, and except as hereinafter specifically admitted this defendant denies that said stock is entirely held—1975 shares in the name of Norton, 250 shares in the name of Union Savings & Trust Company, and 25 shares in the name of unknown persons.

This defendant admits that such conveyance was made by Norton to the Seattle Water Front Realty Company, but denies that the same was by direction of the said Baker, and also denies that the same was without actual consideration, but alleges that the same was for a full and adequate consideration but admits that a part of the said consideration was the issuance of the capital stock of the said corporation.

This defendant avers that on or about April 26, 1907, four shares of the capital stock of said company were issued for a valuable consideration to George F. Meacham of Seattle, who is the owner and holder thereof; that on or about the same date one share of the capital stock of said corporation [60]

was issued for a valuable consideration to Albert H. Beebe of Seattle, Washington, who is the owner and holder thereof; that on or about the same date one share of the capital stock of said corporation was issued to Harry J. Sondheim of New York City, who on September 15, 1908, transferred the said share to Percival H. Gregory, who is the holder thereof the defendant Baker being the owner; that on or about the same date one share of the capital stock of said corporation was issued to Frank Cummings of Preble, New York, who is the holder thereof the defendant Baker being the owner; that on or about the same date seventy-five shares of the capital stock of said corporation were issued to the defendant Norton, the said shares representing and being issued in consideration of his undivided interest in the said lands and lease hereinbefore mentioned, the said Norton being now the owner and holder of said shares; that on or about the same date twenty-four hundred and eighteen shares of the capital stock of said corporation were issued to the defendant Norton, as the nominee of the defendant Baker, and the defendant Norton thereupon assigned and delivered the certificate for the said twenty-four hundred and eighteen shares to the defendant Baker, said shares representing and being issued in consideration for his undivided interest in said lands and lease hereinbefore mentioned. That on June 14, 1907, the defendant Baker transferred for a valuable consideration ten shares of the capital stock of said corporation to May L. Norton of Suffern, New York, who is the owner and holder thereof. That on the same date the defendant Baker transferred to the defend-

ant Norton twenty-five shares of the capital stock of said corporation in consideration of legal services theretofore rendered by the defendant Norton to the defendant Baker, which services had theretofore been agreed [61] upon between the defendant Norton and Baker as $1,250.00, and the said defendant Norton is the owner and holder of said shares. That on July 25, 1907, the defendant Baker transferred two hundred and fifty shares of the capital stock of said corporation for a valuable consideration to the Union Savings & Trust Company of Seattle, Washington, which is now the owner and holder of said shares. That on January 17, 1908, the defendant Baker transferred five shares of the capital stock of said corporation to Clay Hardin of the city of New York, said transfer being for a valuable consideration, and said Hardin is now the owner and holder of said shares. That on January 17, 1908, the defendant Baker transferred for a valuable consideration five shares of the capital stock of said corporation to Louisa Buchanan of Tulalip, Washington, who is the owner and holder of said shares. That on February 4, 1908, the defendant Baker transferred for a valuable consideration five shares of the capital stock of said corporation to Irene Hoffman of New Albany, Indiana, who is the owner and holder of said shares. That on February 4, 1908, the defendant Baker for a valuable consideration transferred five shares of the capital stock of said corporation to Pauline Hoffman of New Albany, Indiana, who is the owner and holder of said shares. That on December 22, 1909, for a valuable consideration the defendant Baker transferred twenty-four

shares of the capital stock of said corporation to Irene Russell Washburn of Nashville, Tennessee, who is now the owner and holder of said shares. That on July 29, 1910, the defendant Baker transferred to the defendant Norton twenty-five shares of the capital stock of said corporation in consideration of legal services theretofore rendered, which services had been agreed upon by the defendant Baker and Norton as [62] $1250, and the defendant Norton is now the owner and holder of said shares. That on October 2, 1911, the defendant Norton for a valuable consideration transferred five shares of the capital stock of said corporation to Charles L. Downs of the city of New York, who is now the owner and holder of said shares.

ELEVENTH.

This defendant admits that the tide lands and lease hereinbefore described are and at all times have been situated in the Western District of Washington, and also admits that the shares of stock in said defendant Seattle Water Front Realty Company are personal property and its location is where said corporation is incorporated and has its principal place of business, which is in Seattle, Washington, and nowhere else, and such has been the *locus* of the stock of said company at all times since the incorporation of said Seattle Water Front Realty Company.

TWELFTH.

This defendant denies that the alleged facts set forth in the said bill were wholly unknown to any of the creditors or stockholders of the said bank, or to the plaintiff, or to the Comptroller of the Currency

until the year 1913, and denies that they were until that time concealed from them by the defendants as in said bill set forth, or otherwise, and denies that the proceedings in said receivership and the acts and doings of the said Baker as receiver were first discovered by the Comptroller of the Currency on or about February 1, 1913, but avers that the plaintiff or his predecessors in interest knew or had means of knowing for more than three years prior to the commencement of this action, to wit, since January 1897, all facts known to him now, and that the plaintiff is, therefore [63] barred by the statute of limitations.

This defendant has no knowledge whether or not the plaintiff has been directed by the Comptroller of the Currency to commence and prosecute this suit.

This defendant avers that all facts in said bill of complaint set forth, and all matters connected with said receivership, and all dealings with reference to the said block 430 of Seattle Tide Lands and of the harbor area lease adjacent thereto and the method of handling the same, were matters known to the Comptroller of the Currency and were conducted under and pursuant to his advice and direction; in addition to which the same were matters of public record open to the world, and the same state of facts which now exist and form the basis of the allegations in said bill of complaint have existed at all times since the Merchants' National Bank of Seattle was placed in the hands of a receiver, and could and would have been discovered and made known to anyone investigating the same, or investigating or inquiring into the doings of affairs of said receivership.

This defendant further avers that by reason of these facts, the plaintiff is guilty of laches and is also estopped from setting up or asserting said allegations as a lawful basis for an action at law or in equity against the defendants, or either of them, or against the various stockholders of the Seattle Water Front Realty Company.

This defendant denies that the plaintiff, as receiver of the Merchants' National Bank of Seattle, is the owner of the tide lands and lease in said bill of complaint described. This defendant denies that no title thereto has passed from the defendant Baker as receiver of said insolvent bank to said Simpson, or from said Simpson to said Norton, and further denies that by the conveyance of the said premises by the State of [64] Washington to the said Norton the equitable title, or any title, passed to the then acting receiver of said bank, and denies that the title acquired by Norton was held by him as trustee for the receiver of the Merchants' National Bank of Seattle, and denies that it is now held by the Seattle Water Front Realty Company as trustee for the plaintiff, or for any other person whomsoever other than the stockholders of said company, and denies that the defendant Baker and the Seattle Water Front Realty Company have known of any state of facts whether those alleged in the said bill of complaint, or otherwise, that said premises belong to the receiver of said bank and form a part of the estate of said insolvent bank.

This defendant avers that for a period of more than seven successive years prior to the commencement of this action it together with its predecessors

in interest have in good faith paid all taxes legally assessed against the above property, and it is still paying said taxes, and that by reason thereof and by virtue of the laws of the State of Washington this defendant is now the legal owner of said property.

This defendant denies that the actions, doings and pretenses of this defendant, or either of the defendants, are contrary to equity and good conscience and tend to wrong, injure or oppress the plaintiff or any other person whomsoever.

This defendant avers that the plaintiff has no legal capacity to reimburse these defendants, or either of them, for any moneys expended in perfecting the title to the said property, or preserving the same against tax liens or otherwise, and further avers that the said plaintiff is without funds with which to do the same had he the legal capacity so to spend said funds, and therefore the plaintiff as this defendant avers is not legally capable of doing equity in the premises. [65]

WHEREFORE this defendant prays that the bill of complaint be dismissed and that it go hence with its costs and disbursements.

BENJAMIN S. GROSSCUP,
WM. C. MORROW,
CORWIN S. SHANK,
HORATIO C. BELT,
Attorneys for Defendant, Seattle Water Front Realty Company, a Corporation.

Rec'd copy of within Oct. 28, 1913.
BAUSMAN & KELLEHER,
Attys. for Pltff.

[Indorsed]: Amended Answer of Deft. Seattle Water Front Realty Co., a Corporation, to 2d Amended Complaint. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Oct. 29, 1913. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [66]

[Opinion.]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 1.

JOHN W. SCHOFIELD, as Receiver of MERCHANTS' NATIONAL BANK,

Plaintiff,

vs.

CHARLES H. BAKER et al.,

Defendants.

Filed Jan. 1914.

BAUSMAN & KELLEHER, for Plaintiff.

B. S. GROSSCUP, W. C. MORROW, CORWIN S. SHANK, H. C. BELT, for Defendants.

NETERER, District Judge.

This is an action commenced by John W. Schofield, as receiver of the Merchants' National Bank of Seattle, against Charles H. Baker and others to set aside a conveyance of certain tide land property, and to declare the respondent Seattle Water Front Realty Company, a trustee for the benefit of the creditors of the Merchants' National Bank. Notice and

application for commission to take depositions together with interrogatories to be answered by John W. Schofield, receiver, and F. P. Kane, Comptroller of Currency, are presented. Objections to certain interrogatories are filed on the part of the plaintiff. The interrogatories propounded to F. P. Kane and objected to are as follows:

"5. By whom were you first made acquainted with this claim?

7. Has John W. Schofield or yourself any funds or property belonging to the Merchants' National Bank? If so give a detailed list thereof.

9. State when the last entries were made in the accounts of this bank.

10. State at whose instance, request or suggestion was the resignation of A. W. Frater, as receiver, asked for, and John W. Schofield appointed receiver of the Merchants' National Bank.

11. Is it not a fact that the Merchants' National Bank, or the receiver thereof, have not now any property or assets whatsoever? [67]

12. Is it not a fact that there have been no funds or other property in the said estate since A. F. Frater, as receiver, made his final account to the Comptroller of the Currency.

13. Have you or any of your subordinates had any correspondence with the attorneys for the plaintiff, or anyone else, bearing upon this litigation? If you answer this question in the affirmative, attach hereto a copy of all letters written and copies of the replies thereto, and designate them as exhibits to your deposition."

Interrogatories propounded to Schofield and objected to are:

"6. At the time you were appointed receiver of the Merchants' National Bank did you receive any funds or any property, and if so give a detailed statement of such funds and property.

7. Have you received since your appointment any funds or property, and if so give a detailed statement of such funds and property.

8. Have you now any funds or property, and if so give a detailed statement of such funds and property.

9. If you answer the last question in the affirmative, state when and where you acquired these funds or property.

10. Have you had any correspondence with reference to this litigation with anyone? If so attach hereto copies of the letters which you have written, and also the replies you have received thereto, or other letters that you have received bearing upon the subject matter of this litigation."

I think from a reading of the interrogatories the conclusion is inevitable that each and all of said interrogatories seek to elicit information which is entirely irrelevant to the issues in this case. What concern can it be to the defendants as to the facts upon which the Comptroller of the Currency based his judgment in the appointment of a receiver and directed the action to be instituted? What benefit could accrue to the defendants by information as to what funds, if any, were turned over to the plaintiff receiver, or what right have the defendants to a detailed statement of funds and property in the posse-

sion of the plaintiff receiver. The information sought by these inquiries are questions which are referred to the judgment and discretion of the Comptroller of the Currency, and his determination is conclusive.

Sanger vs. Upton, 91 U. S. 45, 59. [68]

This principle was also applied in the case of Cadle, Receiver, vs. Baker & Co., 20 Wall. 650, 651, in which the Court held:

> "It is sufficient for the purpose of a suit that he has been appointed, and is receiver in fact. As to debtors, the action of the Court in making the appointment is conclusive until set aside on the application of the bank. The bank may move in that behalf, but the debtor cannot."

See, also, Cassey vs. Galli, 94 U. S. 673.

The information sought in interrogatories 10 and 13, respectively, is too broad and indefinite. There is certain information with relation to the correspondence which would, under the issues in this case, undoubtedly be material, and to the possession of which the defendants are entitled, but the scope of the interrogatories 10 and 13 are entirely too comprehensive. The suggestion that the communications in the Comptroller's office and of Schofield, the receiver, are privileged and come within "secrets of state," need not be discussed at this time. That is a broad question, the scope of which has many ramifications; and I do not think it is necessarily involved in the dispositions of these objections.

The objections to the interrogatories indicated are sustained.

JEREMIAH NETERER,
Judge.

[Indorsed]: On Motion to Strike Certain Interrogatories. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 8, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [69]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 1.

JOHN W. SCHOFIELD, as Receiver of MERCHANTS' NATIONAL BANK OF SEATTLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NORTON, and SEATTLE WATER FRONT REALTY COMPANY, a Corporation,

Defendants.

Decree.

This cause having come on to be heard on the 26th day of February, 1914, on the issues framed by plaintiff's second amended complaint and the several answers of defendant Charles H. Baker and of defendant Algernon S. Norton, and the amended answer of defendant Seattle Water Front Realty Company; and plaintiff appearing by his counsel, Messrs. Bausman, Kelleher, Oldham & Goodale, and defendants severally by their counsel Messrs. B. S. Grosscup and Corwin S. Shank, and the cause being submitted and testimony heard on behalf of the com-

plainant and of the defendants, and the Court being advised by argument of counsel on both sides, and the Court having taken under advisement the matters of fact and questions of law therein involved, and having filed herein on the 11th day of March its written opinion thereon, it is

ORDERED, ADJUDGED AND DECREED:

(a) That the pretended sale by defendant Charles H. Baker, as receiver of Merchants' National Bank of Seattle, to Sol G. Simpson of Block 430 of Seattle Tide Lands, King County, State of Washington, by and through an assignment to Sol G. Simpson of [70] a certain tide land contract issued to the Merchants' National Bank of Seattle by the State of Washington and known as tide land contract No. 728 in the records of the State Land Office of the State of Washington, which assignment was of date November 26, 1897, be and the same is now declared to have been fraudulent and to have been assigned for the secret use and benefit of defendant Baker himself as an individual; and that no interest whatever in said contract and said Block 430, or either of them, passed in equity to said Simpson, but that all right, title, and interest in and to said contract and the lands therein covered remain an asset of the Merchants' National Bank of Seattle, its then receiver, and his successors in the trust, including the present complainant herein.

(b) That any and all repurchases of said tide land contract or of Block 430 aforesaid by defendant Charles H. Baker as an individual, whether oral or in writing, are hereby declared fraudulent and void as against the insolvent Merchants' National Bank

of Seattle, its then receiver and his successors in that trust, including complainant, and that all conveyances of Block 430 or assignment of the tide land contract aforesaid by Sol G. Simpson to defendant A. S. Norton are declared fraudulent, void and null as against the aforesaid bank and its receiver and his successors in the trust; that all interest in the aforesaid contract and in Block 430 aforesaid has remained an asset of the insolvent Merchants' National Bank of Seattle aforesaid, undisturbed by any pretended transfers from defendant Baker as receiver to defendant Simpson and by Simpson to defendants Norton, and that said Block 430 of Seattle Tide Lands, King County, State of Washington, is now an asset of the insolvent Merchants' National Bank of Seattle, without regard to [71] any transfers or conveyances hereinbefore or hereinafter mentioned.

(c) That the conveyance by the State of Washington to defendant Norton of Block 430 aforesaid, dated October 16, 1905, is hereby declared to have passed no interest to the defendant Norton in his own right, either for himself or the defendant Baker, or their or either of their subsequent grantees, transferees, or assigns, in their own right, and that this conveyance from the State of Washington was placed in the name of Norton by fraud of the defendant Baker; that the title thus acquired by Norton at law is hereby declared to have passed in trust for the insolvent Merchants' National Bank of Seattle, its then and subsequent receiver, and his successors in the trust, and of right belongs to that trust, and the title thus passing from the State of Washington is

hereby declared to be an asset of that trust; and all declarations of trust issued by defendant Norton to defendant Baker are hereby declared null and void; and any and all conveyances by defendant Norton to the defendant Seattle Water Front Realty Company, each and all, are hereby declared ineffective as transferring any title in Block 430 to the defendant company other than for the use and benefit of the insolvent bank aforesaid, its then and subsequent receivers, including this complainant.

(d) That a certain lease of harbor area, known as Harbor Lease 181, running from the State of Washington, in favor of Sol G. Simpson, and covering land in front of Block 430, is hereby also declared an asset of the insolvent Merchants' National Bank of Seattle and its receiver, and the assignment thereof by Simpson to [72] defendant Baker, and by defendant Baker to defendant Norton, and by defendant Norton to defendant Seattle Water Front Realty Company, are each and all hereby declared void as against the insolvent Merchants' National Bank of Seattle and the complainant and his successors in the receivership for the Merchants' National Bank of Seattle, and that the interests of defendant Baker and his transferees therein are hereby declared to have been acquired in fraud of the rights of the receivership of the Merchants' National Bank of Seattle.

(e) The defendant Seattle Water Front Realty Company and its officers are hereby commanded to execute and deliver to the Clerk of this Court for plaintiff its deed in favor of the Merchants' National Bank of Seattle and John W. Schofield as receiver

of the Merchants' National Bank of Seattle, his successors and assigns, conveying by quitclaim all right, title and interest of the Seattle Water Front Realty Company in and to Block 430 Seattle Tide Lands, and also to deliver and deposit therewith an assignment to the aforesaid bank and to the aforesaid Schofield as such receiver of Harbor Lease 181, which deed and which assignment shall be regularly executed in conformity to the laws of the State of Washington, and the assignment of the lease to be absolute in form, together with the original lease itself; and upon default of compliance by the defendant Realty Company with this provision, the complainant may, if he so desire, have attachment or other process of this Court against the Seattle Water Front Realty Company, its officers, and defendants, Baker and Norton, its controlling stockholders, requiring each and all of them to execute and deliver each and all of the aforesaid instruments by, through and in the name of the defendant Realty Company, and complainant may have the clerk of this Court, upon, or without awaiting, any such default by the defendant Realty Company, execute in favor of complainant or his successors in the trust, a deed to Block 430 and an assignment of the harbor lease aforesaid [73] each in the name of the Seattle Water Front Realty Company, and the same, so executed, may then, with or without supplemental order of this Court, or showing to that effect by complainant, be made a good and sufficient deed of Seattle Water Front Realty Company.

(f) Neither the defendant Seattle Water Front Realty Company nor defendants Baker and Norton

shall be required to make, execute or deliver any of the aforesaid instruments until there shall have elapsed thirty days after the time in which appeal can be taken by defendant Seattle Water Front Realty Company, nor, in the event of appeal being taken by defendant Seattle Water Front Realty Company, until thirty days shall have elapsed after such appeal, if any, shall have been finally determined adversely to it and if, no appeal being taken by defendant Seattle Water Front Realty Company, or such appeal being adversely determined to it, the defendant Seattle Water Front Realty Company shall make such deposit of instruments as aforesaid, then within sixty days from such delivery of conveyances to the clerk of this Court, the complainant shall pay or cause to be paid into this Court for the defendant Realty Company, the sum of $10,977.13, to wit, $8,130.19 principal and $2,846.94 interest, said principal being all the sums by the defendants expended in taxes upon the aforesaid Block 430 and Harbor Lease 181 and in payments directly or indirectly made to the State of Washington under the contract for Block 430 aforesaid and upon said lease, and should complainant fail so to do, he shall lose the benefits of this decree. The defendant company may immediately withdraw the aforesaid sum without further order of the Court.

(g) Nothing hereinbefore shall be construed to impair the effect of this decree as one in itself reinvesting the title to Block 430 and of the contract upon which it was based and of the deed of the State of Washington based upon such contract, as hereinbefore [74] detailed, exclusively hereby and here-

with in the insolvent Merchants' National Bank of Seattle and complainant John W. Schofield as its receiver and his successors in that trust, forever, to be by him held, sold, managed, and accounted for as any other asset of such trust, but that the provisions hereinbefore requiring conveyance by the defendants are simply cumulative hereto. This decree hereby quiets the title to Block 430 Seattle Tide Lands, King County, Washington, forever in complainant and his successors in the trust, and each and all the defendants are hereby adjudged to be without, and they are forbidden and enjoined from asserting, any title contrary to that of complainant.

(h) It is further ordered that complainant recover of each and all the defendants herein his costs and disbursements to be taxed.

To all of which the defendants by their counsel present do each except, and their exceptions are allowed.

Done in open court this 1st day of Apr., 1914.

JEREMIAH NETERER,
District Judge.

Copy of within Proposed Decree received and notice of presentation for Mch. 23/14, acknowledged this 19th day of March, 1914.

_____,
Attorneys for Dfts.

[Indorsed]: Decree and Notice of Presentation Thereof. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 1, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [75]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 1.

JOHN W. SCHOFIELD, as Receiver of the MERCHANTS' NATIONAL BANK OF SEATTLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NORTON, and SEATTLE WATER FRONT REALTY COMPANY, a Corporation,

Defendants.

Petition for Appeal.

To the Honorable JEREMIAH NETERER, Judge of the said Court:

Come now the above-named defendants, Charles H. Baker, Algernon S. Norton, and Seattle Water Front Realty Company, a corporation, and feeling themselves aggrieved by the final decree made and entered in the above-entitled court and cause on the 1st day of April, A. D. 1914, do hereby jointly and severally appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors, which is filed herewith, and pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, Califor-

nia; and your petitioners further pray that the proper order touching the security to be required of them to perfect their appeal and to supersede the said decree pending such appeal be made.

B. S. GROSSCUP,
CORWIN S. SHANK,
W. C. MORROW,
H. C. BELT,
Solicitors for Said Defendants.

[Indorsed]: Petition for Appeal. Filed in the U. S. District Court, Western Dist. of Washington. May 27, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [76]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 1.

JOHN W. SCHOFIELD, as Receiver of the MERCHANTS' NATIONAL BANK OF SEATTLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NORTON, and SEATTLE WATER FRONT REALTY COMPANY, a Corporation,

Defendants.

Assignment of Errors.

Now, on this 27th day of May, A. D. 1914, came the defendants Charles H. Baker, Algernon S. Norton and Seattle Water Front Realty Company, a

corporation, by their solicitors Corwin S. Shank, B. S. Grosscup, Horatio C. Belt and W. C. Morrow, and each severally says that the decree entered in the above cause on the first day of April, A. D. 1914, is erroneous and unjust to these defendants:

I.

Because the plaintiff has no right or authority under the laws of the United States to maintain the action set forth in his second amended bill of complaint on which said cause was tried.

II.

Because the plaintiff has no authority and has at no time had any authority from the officers of the Government of the United States having jurisdiction of receiverships of national banks, to comply with the conditions of the decree which was rendered, or of any decree which under the issues might have been rendered, in that said officers had not prior [77] to the commencement of said suit, nor have they since the commencement of said suit, authorized the payment to plaintiffs or either of them of the money adjudged to be due under the findings of the Court and the money to which said plaintiffs would be entitled under any decree which might or could have been rendered.

III.

Because there is not and has not been for more than ten years last past available to the trust which the receiver represents in this action any funds with which to do equity to the plaintiffs and each of them.

IV.

Because the District Court erred in finding and adjudging that the defendant Baker had no author-

ity to sell Tide Land Contract No. 728 covering the purchase from the State of Washington of Tide Land Block 430 to Sol G. Simpson.

V.

Because the District Court erred in finding and adjudging that the defendant Baker, while acting as receiver of the Merchants' National Bank, did not make a *bona fide* sale of Tide Land Contract No. 728 covering Tide Land Block 430 to Sol G. Simpson, and in finding that the said Baker at the time of making said sale reserved to himself, for his own benefit and use, the said contract and an interest therein.

VI.

Because the District Court erred in finding and adjudging that the defendant Baker did not acquire an assignment of said Tide Land Contract No. 728 covering Tide Land Block 430 from Sol G. Simpson in good faith and in the usual course of [78] business, and in finding that a trust attached in favor of the Merchants' National Bank, its stockholders and creditors, to the title acquired by the said Baker from the said Simpson.

VII.

Because the District Court erred in finding and adjudging that the title acquired by the defendant Baker from the State of Washington to the said Tide Land Block 430 was in trust for the use and benefit of the insolvent Merchants' National Bank, its creditors and stockholders, and in holding that the title acquired by the defendant Water Front Realty Company was and is subject to said trust.

VIII.

Because the District Court erred in finding and adjudging that the plaintiff's action was not, prior to its commencement, barred by lapse of time and laches.

IX.

Because the District Court erred in finding and adjudging that plaintiff's action was not, prior to its commencement, barred by the statute of limitations of the State of Washington.

X.

Because the District Court erred in including in the decree the harbor area lease adjacent to and in front of said Tide Land Block 430 purchased by Sol G. Simpson from the State of Washington after the defendant Baker had ceased to be receiver.

XI.

Because the District Court erred in ordering the defendant Seattle Water Front Realty Company to hold said harbor [79] area lease for the use and benefit of the plaintiff and to convey legal title to the plaintiff.

XII.

Because the District Court erred in finding that the said harbor area lease was at any time a part of the trust of the Merchants' National Bank.

XIII.

Because the District Court erred in finding and adjudging that the stock of the defendant A. S. Norton in the defendant Seattle Water Front Realty Company, which was issued to said Norton in consideration of an undivided 3% interest, purchased by said Norton from said Baker prior to the convey-

ance to said defendant Seattle Water Front Realty Company, was not a *bona fide* purchase by said Norton, and the Court erred in holding that said 3% interest was subject to said trust of the Merchants' National Bank and its receiver.

XIV.

Because the District Court erred in finding and adjudging that the interest in the defendant Seattle Water Front Realty Company owned by A. S. Norton in the form of stock purchased by him after the formation of said company, and the interest in said company owned by the Union Savings Bank & Trust Company of Seattle in the form of stock assigned to said company, is subject to the trust decreed by the Court in favor of the plaintiff.

XV.

Because the District Court erred on the trial in admitting, over the objections of the defendants, that portion of the testimony of the witness Francis Rotch wherein it [80] appears that the said Rotch, in answer to a question to state a conversation with Sol G. Simpson in 1890, testified:

> "Mr. Simpson was turning a great many things over to me and of course I opened a great deal of his mail, unless it was marked Personal, and I came across a notice from the Land Commissioner saying that there was a payment due and interest due on Block 430 and so I went to Mr. Simpson and asked him whether I should pay it or not * * * . That was in the year 1900—the end of 1900. I have refreshed my memory about that. He said, 'Yes.' He said 'Pay that.' He says, 'That belongs to Charlie

Baker,' and then I said, 'Shall I pay it?' and he says, 'Yes, pay it.' And then I paid it and made the entry of it in my books and charged Mr. Baker with that payment, but that was all the conversation we had at that time as I remember it."

And after a further question, as follows:

"It came up again about two years later—I think 1902; I am not quite certain about that, and Mr. Simpson was hard up in those times. He had a good deal of property but did not have much money and we had been selling off quite a lot of his property in order to obtain money, and I went to him again and I said: 'Now, can't we get rid of this Block 430?' I thought maybe at that time probably he got it from Baker or something of the kind. He said, 'No, Mr. Baker put that in my hands and I have to hold it in trust for him right along.' He said, 'We cannot dispose of that.'"

And further, in answer to a question by plaintiff's counsel:

"Q. Just the same, he told you in substance that he was carrying that property for Charlie Baker, or words to that effect?

"A. Yes, sir.

"Q. And that he never had any interest in it?

"A. Yes."

To all of which testimony, and the questions eliciting the same, objection was made at the time on the ground that the evidence was hearsay, immaterial and irrelevant.

XVI.

Because the District Court erred in admitting on the trial the evidence of the witness Lester Turner over the objection of the defendants, that in 1898 or 1899 he, the witness, had a conversation with Sol. G. Simpson as follows: [81]

> "The conversation came up in this way: I was talking to Mr. Simpson in regard to tide land holdings that the bank held. It owned quite a large amount of tide lands and he was director of the bank, and I talked to him about the plans of the bank and in that connection I asked him about his own holdings down there. I knew that he held some tide lands. And he told me that a portion of those lands belonged to Charlie Baker—that he was carrying the title for him to accommodate him."

And also the following in response to a question as to a later conversation:

> "I do not know the occasion of it—I do not remember the occasion of it, but it occurred in the bank. It was with reference in some way incidentally to the properties and I asked him how he came to hold the title to that property that belonged to Baker. 'Well,' he said, 'Baker did not want it known that he had taken the property while he was receiver of the bank and it might not bear investigation,' and he was carrying it for that reason."

Which testimony was objected to by defendants' counsel as hearsay, immaterial and irrelevant.

XVII.

Because the District Court erred in rendering a

decree in favor of the plaintiff, which decree is contrary to the testimony and against the law because the equity of the case entitled the defendants to a decree of dismissal.

Wherefore, the defendants and each of them pray that the said decree be reversed and the District Court directed to dismiss the bill; and for such other relief as the defendants and each of them are entitled to in equity.

CORWIN S. SHANK,
H. C. BELT,
B. S. GROSSCUP,
W. C. MORROW,

Solicitors for Defendants, Seattle Water Front Realty Company and Charles H. Baker and Algernon S. Norton.

[Indorsed]: Assignments of Error. Filed in the U. S. District Court, Western Dist. of Washington. May 27, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [82]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 1.

JOHN W. SCHOFIELD, as Receiver of the MERCHANTS' NATIONAL BANK OF SEATTLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NORTON, and SEATTLE WATER FRONT REALTY COMPANY, a Corporation,

Defendants.

Order Allowing Appeal and Fixing Supersedeas.

The above-named defendants having heretofore filed herein their petition for appeal from the final decree herein and assignment of errors, and having petitioned for a supersedeas of said decree; now, therefore, it is hereby

Ordered, that the said petition be granted, and the said appeal is hereby allowed and is to operate as a supersedeas of the final decree herein upon the execution of a bond as required by law in the sum of $2,500.00.

Dated this 27th day of May, 1914.

JEREMIAH NETERER,

Judge.

[Indorsed]: Order Allowing Appeal and Fixing Supersedeas. Filed in the U. S. District Court, Western Dist. of Washington. May 27, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [83]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 1.

JOHN W. SCHOFIELD, as Receiver of the MERCHANTS' NATIONAL BANK OF SEATTLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NORTON, and SEATTLE WATER FRONT REALTY COMPANY, a Corporation,

Defendants.

Appeal and Supersedeas Bond.

Know All Men by These Presents, that we, Seattle Water Front Realty Company, a corporation, Charles H. Baker and Algernon S. Norton, as principals, and the United States Fidelity & Guaranty Company, as surety, are each, jointly and severally, held and firmly bound unto John W. Schofield, Receiver of the Merchants' National Bank of Seattle, the plaintiff in the above-entitled suit, in the just and full sum of Twenty-five Hundred Dollars ($2,500.00), lawful money of the United States, for which money, well and truly to be paid, we each, jointly and severally, bind ourselves, our successors, heirs, administrators and assigns.

Sealed with our seals and dated this 25th day of May, A. D. 1914.

The condition of this obligation is such that whereas the above-named plaintiff, John H. Schofield,

receiver of the Merchants' National Bank of Seattle, on the 1st day of April, A. D. 1914, recovered a decree against the above-named defendants in the District Court of the United States for the Western District of Washington; and whereas the above-named defendants, and each of them, have instituted proceedings for an appeal from said decree of the District Court of the United States for the Western District of Washington to the United States Circuit Court [84] of Appeals for the Ninth Circuit;

Now, therefore, if the said defendants and appellants shall prosecute their appeal to effect and answer all damages and costs if they or either of them fail to make good his or their plea, including damages for delay and costs and interest on the appeal, not exceeding, however, the sum of Twenty-five Hundred Dollars ($2,500.00), then this obligation shall be void; otherwise to remain in full force and effect.

SEATTLE WATER FRONT REALTY COMPANY.

By B. S. GROSSCUP,
Its Solicitor Duly Authorized.

CHARLES H. BAKER,

By B. S. GROSSCUP,
Its Solicitor Duly Authorized.

ALGERNON S. NORTON,

By B. S. GROSSCUP,
Its Solicitor Duly Authorized.

UNITED STATES FIDELITY & GUARANTY CO.

By HARRY C. MILLER, [Seal]
Attorney in Fact.

The foregoing bond approved this 27th day of May, A. D. 1914.

JEREMIAH NETERER,
Judge.

[Indorsed]: Appeal and Supersedeas Bond. Filed in the U. S. District Court, Western Dist. of Washington. May 27, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [85]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 1.

JOHN W. SCHOFIELD, Receiver,
Plaintiff,

vs.

CHARLES H. BAKER et al.,
Defendants.

Defendants' Proposed Statement of Testimony.

B. S. GROSSCUP,
W. C. MORROW,
CORWIN S. SHANK,
H. C. BELT,
Attorneys for Defendants. [86]

Amendments.

At the opening of court the plaintiff amended the second amended complaint, changing the number of the block from that of #431, as set forth in the complaint, to #429.

Pursuant to notice given by the defendant three months previously, the defendant Baker made certain amendments to his answer, as follows:

From the end of paragraph IV by striking out

line 29, page 3, and substituting therefor "which purchase was agreed upon in the spring of 1899 and finally consummated in 1905."

On page 6, paragraph 7, lines 5 and 6, by striking out the words "this defendant's termination of said trust," and substituting therefor "about the month of March, 1899." And on lines 7 and 8 by striking out the words "while this defendant was receiver," and substituting in place thereof "prior to that date."

On page 10, paragraph XII, line 2, by striking out the words "his connection with said trust had ceased," and substituting therefor "S. G. Simpson had purchased this assignment of said contract."

On page 10, line 13, after the word "laches" by adding "and by lapse of time."

On page 3, line 27, by changing the word "repurchased" to the word "purchased." [87*—1†]

Statement of Testimony.

The plaintiff offered in evidence a certificate showing that Archibald W. Frater resigned and the plaintiff John W. Schofield was appointed receiver of the Merchants' National Bank of Seattle, Washington, on February 11, 1913 (Plaintiff's Exhibit 1).

There were two maps introduced in evidence showing the tide land properties of Seattle (Plaintiff's Exhibit 2)—one being introduced by the plaintiff and the other by the defendant. The original maps by stipulation are on file with the record.

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*Page-number appearing at foot of page of certified Transcript of Record.

†Original page-number appearing at foot of page of Defendants' Proposed Statement of Testimony as Same appears in Certified Transcript of Record.

The following letters were introduced in evidence by the plaintiff:

Plaintiff's Exhibit 3 [Letter, Dated January 26, 1897, Chas. H. Baker, Receiver, to Comptroller of Currency].

No. 2985.

THE MERCHANTS' NATIONAL BANK.
CHAS. H. BAKER,
Receiver.

Answered.
Feb. 13, 1897.
Org. Div. K.

Office Comptroller
Feb. 11, 1897,
of Currency.

Seattle, Wash. Jan. 26, 1897.

Hon. James H. Eckels,
Comptroller of Currency,
Washington, D. C.

Dear Sir:

By virtue of being an upland owner of property bordering upon Seattle Harbor this bank is entitled to the prior right to purchase from the state certain contiguous tide lands as under the rulings of the tide and commission may be awarded. The law gives the right to contract for such purchase in ten annual payments, which contracts are assignable. This right of purchase is a valuable asset of the trust and accordingly I respectfully ask you to ratify the following contracts between the State and myself as receiver:

All of Block 429.....Appraised value $ 664
Lots 13 to 18 Block 444.....Appraised value 24
Lots 1 to 8 & 13 to 20 Block
432.....Appraised value 472

All of Block 430.....Appraised value 1488
Lots 3 to 11 Block 443.....Appraised value 167

Very respectfully
CHAS. H. BAKER, Rec. [88—2]

Plaintiff's Exhibit 4 [Letter, Dated February 13, 1897, Deputy and Acting Comptroller of the Currency, to Charles H. Baker, Receiver].

Treasury Department, Washington.
Office of
Comptroller of the Currency.
Address reply to
Comptroller of the Currency.

February 13, 1897.

Mr. Charles H. Baker,
Receiver, Merchants' National Bank,
Seattle, Washington.

Sir: Your letter of the 26th ultimo is received, in reference to the ownership of the bank to property bordering upon Seattle harbor and its right to purchase from the State certain contiguous tide lands.

In view of your statement, you are hereby authorized to contract with the State for the purchase of the lands described in your communication, and, inasmuch as the contracts are assignable, they can no doubt be disposed of to advantage at any time, should such a course seem advisable.

Very respectfully,
(Signed) GEO. M. COFFIN,
Deputy and Acting Comptroller.

Plaintiff's Exhibit 5 [Letter, Dated October 29, 1897, Chas. H. Baker, Receiver, to Comptroller of Currency].

No. 2985.

THE MERCHANTS' NATIONAL BANK,
CHAS. H. BAKER,
Receiver.

Office Comptroller
Nov. 4, 1897,
of Currency.

Seattle, Wash., Oct. 29th, 1897.

Hon. James H. Eckels,
Comptroller of Currency,
Washington, D. C.

Answered
Nov. 10, 1897.
Insolvent Banks

Dear Sir:

I am in receipt of your favor of the 18th relative to the report of Mr. Seeley, Examiner, upon the condition of this trust. As to a reduction of expenses in this trust, I suggested to Mr. Seeley that he recommend to you the cancellation of the contract with the attorneys on January 1st next, under which they are paid $200 a month. The litigation is nearly all closed excepting several important suits which are either on appeal or will be disposed of definitely within that time, and if not probably the compensation to Jan. 1st could be made to cover the services in any event. This recommendation of course does not apply to attorneys employed in New York, Chicago, Milwaukee and San Francisco who are to receive specific fees for services rendered, subject to your approval. Further retrenchment would be detrimental.

I have discontinued the payment of taxes on the trusts real estate, which I respectfully request you to endorse as a measure of economy, for the reason that under our law such property is safe from levy and sale for two years with an additional [89—3] two years redemption, and also because I find the incumbrance of taxes does not materially affect the prices which I am able to get in sale or trade. I visited last spring the final sales of your receivers in Tacoma, and I noticed that often the amount of taxes due was not inquired into until after the item had been purchased, and there seemed to be a general indifference as to whether the property was clear or not. The taxes in this trust amount to several thousand dollars.

The progress made in the collection of assets has not during the last year been as great as could be desired, but nevertheless under the conditions prevailing a better showing could not have been made. The last year here has been the worst of all during the depression and the situation has been distressing and hard to picture correctly to one not living here. Within six weeks however there has been a very marked improvement, due to the successful and high priced crops, Alaska trade and an active shingle market. The conditions warrant the belief that the spring will open up here with a flood of prosperity, all of which will enable people to liquidate and will give rise to a market for real estate. This is apparent already in several exchanges which I have effected on a basis of several hundred per cent in excess of my estimated value. I expect to reduce the total liability of the trust from 25% to 50% of trad-

ing off assets that hardly have a cash value, and this will facilitate more frequent and larger cash dividends to those still holding claims.

My note which is among the charged off paper in the bank is in the same situation as formerly. At the request of Mr. Seely, Judge Stratton who is one of the ablest lawyers at the bar, very thoroughly investigated this matter, and advises that I am correct in my contention that the bank is liable to me for $2500 rather than I to it for $9500. Mr. Lewis who was my attorney at the time of the failure held the same opinion, and had at the time prepared papers for a suit against the bank to compel an accounting, but was deterred from serving them by the failure and my subsequent appointment. The history of the case and its status Mr. Seeley will, so he informed me, give to you in a special report upon his return to Washington. The chief wrong to me appears in the fact that the bank sold my collateral bonds under an execution upon a judgment obtained against another company to which I was not a party. These bonds when they are afterwards reconverted by the bank for $12000 should have retired my note and given me the $2500 surplus. Aside from any pecuniary advantage I would have in prevailing against the trust in a suit at law, I have felt that I would like to vindicate my position in the matter through the courts, but this seems inconsistent with my relations to the trust. I have also felt that, assuming I am in error in my contention, the fact will be more than offset by the particular and full value that my personal efforts will give to the bonds of the Third St. Ry. which as referred to

above came into the trust indirectly through my note, the payment of which while the bank was still solvent, would, the former officials stated, have retired the note at the same time. These bonds are of questionable value now, but under the general consolidation of the surface roads here which I expect to carry through this winter, the bonds will have a high value or may become cash, and upon a larger scale than other holders of the same bonds will realize. The financial end of the reorganization I have arranged—the only embarrassment being the temporary disinclination [90—4] of the road controlled by N. W. Harris & Co. to go in. The expense of surveys, printing, travelling and clerical work incidental to promoting this consolidation I have borne personally for three years, which fact has kept me poor. As a direct result of this reorganization, no greater advantage will accrue to any one interest relatively than to this trust. Aside from any equitable defense there may be to the note bearing my signature, any disinterested person will advise that it has no value, though for me to officially so pronounce would probably be out of place.

Appearances now indicate that the most active period of the trust, second only to the first six months of its life, will soon occur, and I anticipate that some of the slowest of the assets can be handled to advantage and considerable cash realized. The widespread advertising given to this particular section on account of the Klondyke gold excitement, and the consequent impetus given to trade and emigration here, will soon prove a factor of profit to the trust

not considered in making estimates.

Very respectfully,

CHAS. H. BAKER,

Receiver.

[Statement of Testimony of E. C. Townsend, on Behalf of Plaintiff.]

E. C. TOWNSEND was called on behalf of plaintiff and testified that he was then and had been for nearly eight years connected with the State Land Office at Olympia. He produced the contract with the State covering block 430, which together with the assignments and acknowledgments reads as follows: [91—5]

Plaintiff's Exhibit 6 [Agreement, Dated January 12, 1897, State of Washington and Merchants' National Bank of Seattle].

WATERWAY LIEN CLAUSE.

Original.

THIS AGREEMENT, Made in duplicate this 12th day of January, 1897, by and between the State of Washington, party of the first part, and The Merchants National Bank, of Seattle, King County, Washington, of the second part, pursuant to an act of Legislature of said State entitled "An act to provide for the selection, survey, management, lease and disposition of the State's granted, tide, oyster and other lands, harbor areas, and for the confirmation and completion of the several grants to the State by the United States, creating a Board of State Land Commissioners, defining their duties and authorizing them to act as the commission provided for in article 15 of the State Constitution, and declaring an emer-

gency," approved March 26, 1895:

WITNESSETH, That the party of the first part, in consideration of the sum of Fourteen Hundred Eighty-eight and no/100 (1488.00) Dollars, to be paid as hereinafter agreed, and of the faithful performance of the covenants, agreements, and conditions hereinafter expressed, on the part of the part— of the second part to be performed and kept, hereby agrees to sell to the part— of the second part the certain tract or parcel of tide land of the first class, situated in King County and State of Washington, described as follows, to wit:

> All of Block Four Hundred Thirty (430), according to the survey thereof, as shown on the Map of Seattle Tide Lands, filed in the office of the Board of State Land Commissioners, at Olympia, Washington, on the 15th day of March, 1895.

Subject, however, to any lien or liens that may arise or be created in consequence of or pursuant to the provisions of an act of the Legislature of the State of Washington entitled "An act prescribing the ways in which waterways for the uses of navigation may be excavated by private contract, providing for liens upon tide and shore lands belonging to the state, granting rights of way across lands belonging to the state," approved March 9, 1893.

And the party of the second part hereby covenants and agrees to purchase of the party of the first part the above described land, and to pay therefor the full sum of Fourteen Hundred Eighty-eight and no/100 (1488.00) Dollars in manner following, that is to say :

The sum of $148.80 at or before the execution of this contract, the receipt whereof is hereby acknowledged.

The sum of $148.80 principal and $10.72 interest, on the first day of March, 1897.

The sum of $148.80 principal, and $71.44 interest, on the first day of March, 1898.

The sum of $148.80 principal, and $62.51 interest, on the first day of March, 1899. [92—6]

The sum of $148.80 principal, and $53.58 interest, on the first day of March, 1900.

The sum of $148.80 principal, and $44.65 interest, on the first day of March, 1901.

The sum of $148.80 principal, and $35.72 interest, on the first day of March, 1902.

The sum of $148.80 principal, and $26.79 interest, on the first day of March, 1903.

The sum of $148.80 principal, and $17.86 interest, on the first day of March, 1904.

The sum of $148.80 principal, and $8.93 interest, on the first day of March, 1905.

And the said second party covenants and agrees to pay said principal sum and interest as above specified at the rate of six per cent per annum in gold coin of the United States, at the office of the State Treasurer at the capital of said state, and that it will pay all taxes and assessments of every kind that may be levied or assessed on said land and premises, and that if said second party shall fail to pay any of the sums above specified, either of principal, interest, taxes or assessments, when the same shall become due and for six months thereafter, it will, on demand of the Board of State Land Commissioners or other

authorized officer of the State, quietly and peaceably surrender the possession of the above described land and premises and every part thereof; and upon the failure to pay as above specified, all rights of said purchaser under this contract, may, at the election of said Board of State Land Commissioners acting for the State of Washington, and without notice to said purchaser, be declared forfeited, and when so declared forfeited and thereupon the state shall be released from all obligation to convey said land; and all payments theretofore made on this contract, and any and all improvements made on said land, or any part thereof shall thereupon be forfeited to and belong to said State of Washington.

But if said party of the second part shall well and faithfully keep and perform all the covenants and agreements hereinbefore specified by it to be kept and performed in the manner and at or before the times above specified, it shall be entitled to a patent to said land from said State of Washington as provided by law upon surrender of this contract and cancellation of same.

The terms of this contract shall be binding in favor of and against the said party of the second part, its successors and assigns, but no assignment of this contract shall in any way relieve the said party of the second part from the performance of the conditions hereof on its part, nor be recognized nor admitted by said State of Washington, unless the same shall be endorsed hereon and executed, witnessed and acknowledged in the same manner as a conveyance of real estate is required by law to be, and said assignment, shall be accepted by and entered

on the records of the Commissioner of Public Lands; nor shall any such assignment of the party of the second part for less than the entire interest of said [93—7] party to the whole of the lands above described be recognized or admitted.

IN TESTIMONY WHEREOF, the party of the first part, by the Commissioner of Public Lands, and the party of the second part have hereunto subscribed their names in duplicate.

THE STATE OF WASHINGTON.
By W. T. FORREST,
Commissioner of Public Lands.
THE MERCHANTS' NATIONAL BANK.
By CHAS. H. BAKER, Receiver,
Purchaser.

P. O. Address: Seattle, King County, State of Wash.

Witness the signature of purchaser:
M. E. REED.
C. I. PRITCHARD,

STATE OF WASHINGTON.
Office of
COMMISSIONER OF PUBLIC LANDS.

Approved Jan. 22, 1898.
ROBERT BRIDGES,
Commissioner of Public Lands.

ASSIGNMENT.

The Merchants' National Bank, the within named purchaser, for and in consideration of the sum of ($198.80) one hundred & ninety-eight 80/100 dollars, to it in hand paid by S. G. Simpson of the county of King, and State of Washington, do hereby

sell, assign and transfer all its rights, title and interest in and to the within contract and the lands therein described unto the said S. G. Simpson, heirs and assigns forever, and it does hereby authorize the State of Washington to receive from S. G. Simpson or assign the performance of all covenants and agreements in said contract specified to be performed by the party of the second part, and upon such performance to execute to him a patent as it would have been executed to it had this assignment not been made.

And S. G. Simpson, said assignee, hereby covenants and agrees to keep and perform all the covenants and conditions specified in said contract to be performed by the party of the second part.

Given under our hands and seals this 26th day of November, 1897.

THE MERCHANTS' NATIONAL BANK. (Seal)

By CHARLES H. BAKER, Receiver, Assignor.

S. G. SIMPSON, (Seal)
Assignee.

P. O. Address: Seattle.

In presence of—
JOS. B. HILL.
JOHN H. POWELL.

Witnesses to S. G. Simpson's signature:
THOMAS T. LITTELL.
JOHN H. POWELL. [94—8]

ACKNOWLEDGMENT.

State of Washington,
County of King,—ss.

I, John H. Powell, do hereby certify that on this 18th day of January, 1898, personally appeared before me Charles H. Baker, receiver of Merchants' National Bank of Seattle, to me known to be the individual described in, and who executed the within instrument, and acknowledged that he signed and sealed the same as his free and voluntary act and deed as such receiver for the uses and purposes therein mentioned.

Given under my hand and official seal this 18th day of January, A. D. 1898.

(N. S.) JOHN H. POWELL,
Notary Public for State of Washington, Residing at Seattle, said State.

State of Washington,
County of King,—ss.

I, Thomas T. Littell, a Notary Public in and for the State of Washington, residing at Seattle, in the above-named County and State, duly commissioned, sworn and qualified, do hereby certify that on this 19th day of January, A. D. 1898, before me personally appeared S. G. Simpson to me known to be the individual described in, and who executed the within instrument, and acknowledged that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal this 19th day of January, A. D. 1898.

(N. S.) THOMAS T. LITTELL,
Notary Public in and for the State of Washington, Residing at Seattle in said County.

S. G. Simpson (and Mary M. Simpson, his wife) the within named assignee of the purchaser, for and in consideration of the sum of One Dollar to him in hand paid by Algeron S. Norton of Suffern, New York, does hereby assign, sell and transfer all his right, title and interest in and to the within contract No. 728 and the lands therein described as all of Block 430 Seattle Tide Lands unto the said Algernon S. Norton, his heirs and assigns forever, and I hereby do authorize the State of Washington to receive from Algernon S. Norton or his assignee or successor the performance of all covenants and agreements in said contract specified to be performed by the party of the second part, and upon such performance to execute to him a Patent as it would have been executed to the said Simpson, had this assignment not been made and Algernon S. [95—9] Norton, the said assignee, hereby covenants and agrees to keep and perform all the covenants and conditions specified in said contract to be performed by the party of the second part.

Given under my hand and seal this 11th day of August, 1905.

S. G. SIMPSON,
By M. E. REED,
Atty. in Fact.
MARY M. SIMPSON,
By M. E. REED,
Atty. in Fact.
ALGERNON S. NORTON.

Witnessed by,
R. C. FORCE,
NORWOOD W. BROCKETT,
BRONSON P. REYNOLDS,
As to Algernon S. Norton.

STATE OF WASHINGTON.
Office of
COMMISSIONER OF PUBLIC LANDS.
Approved Oct. 12, 1905.

H. P. NILES,
Assistant Commissioner of Public Lands.

State of Washington,
County of King,—ss.

DO HEREBY CERTIFY, That on this 11th day of August, A. D. 1905, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally came Mark E. Reed as the duly constituted and authorized attorney in fact of the within named S. G. Simpson and Mary M. Simpson to me known to be the individual described in and who executed the within instrument, as such attorney in fact, and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned, and as the free and voluntary act and deed of the within named S. G. Simpson and Mary M. Simpson, principal, by him voluntarily done and executed for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal, the day and year in this

certificate first above written.

(N. S.) NORWOOD W. BROCKETT,
Notary Public in and for the State of Washington,
Residing at Seattle.

County of New York,
State of New York,—ss.

I, Louis B. Hasbrouck, a Notary Public in and for the State of New York, residing at No. 257 Broadway, Borough of Manhattan, New York City, in the above county and State, duly commissioned, sworn and qualified, do hereby certify that on the 7th day of September, 1905, personally appeared before me Algernon S. Norton, to me known to be the individual described in and who executed the above instrument, and who acknowledged to me that he signed and sealed the same as his free act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal this 7th day of September, 1905.

(N. S.) L. B. HASBROUCK,
Notary Public, Residing at No. 257 Broadway, Borough of Manhattan, New York City, in said County. [96—10]

State of New York,
County of New York,—ss.

I, THOMAS L. HAMILTON, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, DO HEREBY CERTIFY, That L. B. Hasbrouck, whose name is subscribed to the Certificate of the proof of acknowledgment of the annexed in-

strument, and thereon written was, at the time of taking such proof or acknowledgment, a Notary Public in and for the County of New York, dwelling in the said County, commissioned and sworn, and duly authorized to take the same. And further that I am well acquainted with the handwriting of such Notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said court and county the 8 day of Sept., 1905.

[Seal] THOS. L. HAMILTON,
Clerk. [97—11]

The witness then produced the contract issued by the State to the Merchants' National Bank covering block 429, which contract is identical in form with the contract covering block 430, excepting that the consideration named therein is $664, and the annual payments are $66.40 on principal and the accumulative interest. This contract was assigned by Baker to S. G. Simpson on November 26, 1897; the assignment being approved by the commissioner of public lands February 9, 1898. This same contract was assigned by S. G. Simpson to W. B. Hofius and William Pigott, December, 1899. This assignment was approved by the commissioner of public lands on December 14, 1899.

The witness then testified that he had the ledger with him showing the payments that had been made upon these blocks. That the first payment on contract #728, being block 430, was January 12, 1897,

amounting to $148.80. The next payment was on March 1, 1897, amounting to $148.80 principal and $10.42 interest. That these payments were all the payments that were made on block 430 prior to November 26, 1897. The witness testified that as to contract #727, covering block 429, the first payment was made thereon on January 12, 1897, amounting to $66.40. The next payment was made on March 1, 1897, amounting to $66.40 principal and $4.78 interest. That these payments constituted all that were made on contract #727 before November 26, 1897.

[Testimony of C. B. Bussell, for Plaintiff.]

C. B. BUSSELL was called as a witness for the plaintiff, and testified that he had resided in Seattle for 29 years, and that he was first a clerk for the Hopgrowers' Association, and after that was in the soap business for 2 or 3 years, and since 1889 had been in the real estate business. That he had [98—12] made a specialty of tide lands for about 20 years, buying and selling the tide-land property, and that he was familiar with the market values in Seattle. He stated that he knew the condition of the tide-land market in 1897. That in the summer of 1897—he thought in July—the Klondike discovery in Alaska took place. He stated that, in his opinion, in November, 1897, the fair market value of block 430 of Seattle Tide Lands was $5,000. When he spoke of this valuation that he meant this would be the value of the contract upon block 430 exclusive of the other payments due to the State. He also stated that the original appraisements made by the

(Testimony of C. B. Bussell.)

State upon these tide lands were generally supposed to be a little low. That these prices were fixed in 1895, and that it was no trouble to sell at a margin above the State's prices.

On cross-examination Mr. Bussell, in answer to a question as to whether he has not been generally known in Seattle as a tide-land enthusiast, stated that he supposed he might be called that, and that he had been so told. He also stated in answer to a question asked by Mr. Shank.

Q. And, as a matter of fact, before anyone else ever conceived the idea that there might possibly be values in tide lands, you constantly advanced the idea that there was a future value in tide lands, didn't you? A. Yes, sir.

The witness then testified that he was one of the original tide-land boomers of Seattle. He stated that he had no recollection of any sales of tide lands west of the West Waterway in 1897, 1898, or 1899, excepting possibly that he heard of some in 1899, but did not recall a specific instance.

The witness testified that in 1896 he had bought the contested rights in lots 25, 26, 27, 28, 29, and 30, in block 431, and had paid $200 for them. That this was before any payments [99—13] had been made to the State on account of the contracts. That in 1900 he had sold these lots to a man by the name of Chappelle for $15,000. The witness was then asked whether he knew of any other sales west of the West Waterway prior to 1905, and he answered that he did not know, but he did hear of some sales west of

(Testimony of C. B. Bussell.)

the West Waterway in the fall of 1905.

"Q. (By Mr. SHANK.) Now, is it not a fact that the tide-land movement in Seattle commenced properly in 1905?

A. Well, the greatest inflation was about that time, but there was a steady growth all along, from the time the tide lands were appraised by the State in 1895.

Q. How far from shore is block 430, measuring it from the westerly shore line, how far is block 430 from the shore?

A. I should think something like 2,500 *hundred* feet; it may be 3,000 feet.

Q. Measuring it from the upper end of the bay, how far is it from the shore?

A. I would suppose at least a mile.

Q. Is it not farther than that, as a matter of fact?

A. Maybe a little farther.

Q. From the head of the bay it is a mile and a half or two miles?

A. Considerably over a mile, maybe a mile and a half.

Q. And it is a half a mile out in the bay, measured from the nearest point of land? A. Yes, sir."

The witness then testified that the lots that he had purchased from Capt. Nugent in block 431 were not included in the district covered by the Semple contract.

On redirect examination the witness testified that block 430 was regarded as the best block west of the West Waterway. That it had a water frontage on

(Testimony of C. B. Bussell.)

the bay carrying with it the harbor area in front; also had a water frontage on the West Waterway of approximately 1,000 feet, which gave an added value to that particular block over block 431, which is adjoining it. That block 430 had always been regarded by him as more valuable than the same amount of land in block 431. The witness testified that the value of the block had not been affected [100—14] materially by the fact that it was within the tide-land district which permitted the filling of the property for the reason that it was generally supposed that this land would never be filled, even though there was a contract existing on it for filling, and that this was not considered in estimating values on this land. That he personally in his operations never paid any attention to this contract. The witness further stated that during the years 1896, 7 and 8 there were a great many contests on tide-land property, and that these rights were often sold for a valuable consideration. The witness testified that the preference right during these years was frequently sold irrespective of the contest that was being waged upon the property.

On cross-examination the witness testified that the lots which he got from Capt. Nugent in 1896 had increased in 1897 to about $2,000, and in 1898 to about another $2,000; in 1899 probably to $8,000, and in 1900 to $15,000. That he regarded the relative increase on block 430 as even greater than this.

On redirect examination the witness testified that he was a tide-land boomer, and that by reason of his

(Testimony of A. P. Hill.)

confidence he had made one million dollars, and a good deal more than that.

[Testimony of A. P. Hill, for Plaintiff.]

A. P. HILL, a witness called on behalf of the plaintiff, testified that he had resided in Seattle for 25 years, nine-tenths or ninety-five per cent of which time he had been in the real estate business. That he was in the real estate business from 1897 to 1903. That during 1898 to 1902 he was not in the real estate business, but had kept in touch with valuations. He also stated that he was acquainted with tide-land values in Seattle from the year 1899 down to the present time. He gave it as his judgment that tide-land contract #728 on block 430 in 1897 was worth $4,800. He also expressed it as his opinion that the ownership of this block carried with it the right to purchase the harbor area. The witness stated that he is a brother of J. B. Hill, who in 1897 was a clerk in the office of the receiver, Mr. Baker. [101—15]

On cross-examination the witness testified that in 1897 that there were no tide lands selling in the locality of this property, and that there was very little doing in tide lands until 1905. That prior to 1905 there were sales made in that locality, but not very many; there was no great activity. That up to 1905 tide land west of the East Waterway, which included the section embracing Harbor Island and all west of it, was regarded as speculative, and that it was held up to that time purely for speculative purposes.

(Testimony of A. P. Hill.)

On redirect examination the witness testified that in 1899, William Pigott had bought certain tide lands in that district.

It was then admitted by Mr. Grosscup on behalf of the defendants that the petition and order attached to the second amended bill of complaint in this case is a true copy of the petition filed and the order made by this court, and that there was no other petition or order to this or to any court of record than the one attached to the petition affecting block 430.

Counsel for plaintiff then offered in evidence a letter dated October 9, 1897, from William L. Seeley, special examiner, addressed to James H. Eckels, Comptroller of the Currency; the letter being marked Plaintiff's Exhibit 8, and the report attached thereto, the same [102—16] reading as follows:

Plaintiff's Exhibit 8 [Letter, Dated October 9, 1897, Special Examiner to Comptroller of the Currency].

Treasury Department,
Office of Comptroller of the Currency,
Address Reply to Comptroller of the Currency, Washington, D. C.

Office Comptroller
Oct. 16, 1897,
of Currency.

Seattle, Wash., Oct. 9, 1897.

Hon. James H. Eckels,
Comptroller of the Currency,
Washington, D. C.

Dear Sir:

Herewith I hand you my report upon the condition of the affairs of the Merchants' National Bank

of Seattle, Washington; also certified copies of petition and order authorizing compromise and private sale of the bad and doubtful assets of the trust.

Hoping my action in the premises will meet with your approval, I am

Very respectfully,

WM. L. SEELEY,

Special Examiner.

[Report of Special Examiner to Comptroller of the Currency.]

Treasury Department,

Office of Comptroller of the Currency,

Address Reply to

Comptroller of the Currency,

Washington, D. C.

Seattle, Wash., Oct. 9, 1897.

IN RE THE MERCHANTS' NATIONAL BANK, SEATTLE, WASHINGTON, IN LIQUIDATION.

Hon. James H. Eckels,

Comptroller of the Currency,

Washington, D. C.

Sir: There does not appear to be any material change in the condition of the affairs of this trust, except in reducing to possession and control the real estate held as security by judgments and decrees of foreclosure, and bidding the same in at the sale thereof. The securities so held have been in a majority of cases foreclosed and sheriff's deeds in many, and certificates in others, obtained, in the latter the trust being entitled to deeds within a period of from

one to six months. The foreclosure of a portion of such securities is pending, wherein decrees have been obtained, and the sale will be made without delay.

The receiver is proceeding under the authority given him by you to exchange real estate holdings of the trust for [103—17] receiver's certificates. The disposition of the real estate in this manner is to the interest of the creditors of the trust. From one to five hundred per cent. more can be obtained for such assets than if disposed of at private or public sale. While it is true that there is a material improvement in Seattle, and inside business and dwelling property has appreciated, the effect has not been felt in outside additions, and it is not probable that the holdings of the trust will appreciate to any considerable extent during the life of the receivership. In any event the valuation placed upon the real estate by the receiver in making the exchange for receiver's certificates at their face is sufficient to meet any natural advance and made the exchange favorable and to the interests of all concerned.

I do not find any material appreciation of the assets or change in conditions which justifies reporting thereon in detail, these matters being heretofore fully reported by me. The remaining assets are practically bad and doubtful, from which in my judgment more can be obtained by compromise and private sale than through an attempt to enforce collection, or their disposal at public auction. It is the judgment of the receiver and his attorneys, and it appears to be to the interest of the creditors of the trust, that the receiver have full power and au-

thority to so compromise and sell privately the remaining assets, and I have, in connection with the attorneys of the receiver, petitioned the United States Circuit Court, and obtained an order thereof, authorizing him as such receiver to compromise and sell privately the bad and doubtful assets remaining in his hands, for cash, as it may appear after full investigation, in his judgment, to be to the advantage and best interests of his trust. The balance due upon stock liability, while large in amount, can be realized in part only, and that through compromise settlements, after being placed in judgment. Some two thousand of this amount can be collected without litigation; about ten thousand now involved in pending suits is due from solvent stockholders, and forty-five thousand from the late president, Angus Mackintosh, which latter, it is the opinion of the receiver, can be compromised after judgment for a small percentage.

I did not deem it advisable at this time to include in the general order the exchange of real estate for receiver's certificates, it being my judgment that orders should be obtained in individual cases until the real estate is reduced to possession or control by the termination of foreclosure proceedings, and sale of the real estate included therein, at which time it would appear to be justified, and a saving of court costs and expenses.

The important litigation in the hands of Messrs. Stratton, Lewis & Powell, attorneys for the receiver, is confined to the Denton suit, being the suit to enforce the claim of Angus Mackintosh, $29,716.00,

fully reported; that against the local stockholders embracing a large number of defendants, and against William H. and Minnie Reeves, the latter to enforce collection of the stock in the name of Minnie Reeves and Ira Bronson. This litigation in the ordinary course can be disposed of during the present quarter, at the end of which time the [104—18] salary of said firm, as provided for in the existing contract, should either be materially reduced, or their services compensated reasonably, when necessary thereafter. It would appear at this time that the expenses of the receivership can be considerably reduced, and I respectfully suggest that the matter be considered in ample time to give said firm of attorneys due notice of such reduction.

The claims in dispute, except that of Ira Bronson, are pending as formerly reported; that of Denton—Angus Mackintosh—$29,716.00. The First National Bank of Seattle and National Bank of Commerce of Seattle, $2,196.50 each. The former will be disposed of in pending litigation, and no steps have been taken in the matter of the claims of the banks to enforce them.

I find from an investigation of the status of the indebtedness of Mr. Charles H. Baker to the trust, that proceedings had not been begun by him to adjust the same as heretofore reported. The papers were prepared by his attorney, Mr. J. Hamilton Lewis, of the firm of Stratton, Lewis & Gilman, a short time prior to suspension, but were not filed, owing to the bank's suspension. This indebtedness is represented by a note for the sum of $10,000.00

given by Baker to the bank on January 9th, 1893, in which it was recited that he had deposited with said bank as collateral security for the payment thereof, '$10,000.00 in promissory notes of The Rainier Power & Railway Company, and $20,000.00 first mortgage bonds of said The Rainier Power & Railway Company.' The note also authorizes the bank or anyone authorized to act on its behalf, to sell at private or public sale, with or without notice, at the option of the bank, the whole or any part of said collateral in case of non-performance. Mr. Baker, with the knowledge and consent of said railway company, deposited said notes and bonds. These notes were executed by The Rainier Power & Railway Company by its President D. T. Denny, payable to Chas. H. Baker & Co. and guaranteed by D. T., D. T. Jr. and J. B. Denny, and endorsed by said Chas. H. Baker & Co. Afterwards, on December 16th, 1893, judgment was entered against said railway company and the Dennys upon the said collateral note for the sum of $10,918.77. I find from an examination of the files and records in this matter, that said Chas. H. Baker & Co. appeared and answered, denying liability as guarantors, and alleging the assignment of the note for collection only, such assignment being by an agreement with the bank; that the Dennys answer and allege the delivery of the bonds of the railway company as collateral to its note to said Baker & Co. at the time of the execution thereof. Judgment is by default against the railway company and the Dennys, and the suit is pending as to said Baker & Co. Execution was

issued upon said judgment and levied upon the said twenty bonds of the railway company aforesaid, and after due notice sold to the bank for the sum of $125.00, which amount appears credited upon the note of Chas. H. Baker. Thereafter said bonds were exchanged by the bank for twelve $1,000.00 bonds of the Third Street & Suburban Railroad, a reorganization of said Rainier Power & Railway Company, and the note of Mr. Charles H. Baker charged off. It appears that the said railway company was largely indebted to Baker & Co., and gave to said company its notes, with its bonds as collateral thereto, [105—19] said notes and bonds being thereafter hypothecated by said Baker & Co., and by said Charles H. Baker, separately and together. It is claimed by Mr. Baker that the sale of these bonds as aforesaid was illegal, and is a conversion, and that the bank is liable to him for the full amount of their value at the time of the sale and exchange for Third Street & Suburban bonds, basing the claim upon the ground that it was cumulative collateral, and that the bonds were not pledged as collateral, in the transaction with the bank, to the note of the railroad company; further, that if the sale under said execution could be legally made, that the bank could not in point of law bid in the same as its sale. This position is held by Judge Stratton. I have consulted with Mr. Ira Bronson, the attorney for the bank in the proceedings aforesaid, who contends that the sale as made is legal, and the title to said bonds passed to the bank.

By reason of the extended absence of Mr. Baker in the east and the absence from the city of Seattle of

Mr. Lewis, I have been unable until the present week to obtain any information or action in the premises. A determination of the matter by the courts, cannot now be had, as I am informed, either in the United States Circuit Court or the Superior Court, until December, and in view of that fact, I deem it advisable and respectfully suggest, that action in the premises be postponed until my return to Washington, when I will report further thereon and in detail.

The receiver will follow the provisions of the general order, authorizing him to compromise and sell at private sale the bad and doubtful assets of this trust, and proceed under your instructions to exchange assets for receiver's certificates unless otherwise instructed by you.

Respectfully submitted,

WM. L. SEELEY,

Special Examiner. [106—20]

STATEMENT.

Total amount of claims proved as shown by books		281,972.97
Total liabilities at date of suspension		315,358.28
" claims established not shown by the books.		19,227.83
		334,586.11
Less amount dividends paid	87,959.36	
" liabilities canceled etc.	69,862.51	
" R/C 1st Chicago canceled by collateral	6,244.15	
" " Park of N. Y. " " " etc.	21,531.50	
" " Seattle Clearing H. " " "	15,553.33	
" " Wells Fargo & Co. " " "	3,953.78	
	205,104.63	129,481.48
Claims in dispute not shown by books:		
Denton-Mackintosh judgment		29,716.00
First N. B. Seattle		2,196.50
N. B. of Commerce Seattle		2,196.50
		163,590.48
Cash in hands Receiver 10/1/97	516.30	
Estimate Bills Receivable—cash basis	27,500.00	
" other assets " "	35,000.00	
" balance due from stock assessment—cash basis	7,500.00	
	65,482.84	
Less estimate expense to close	5,000.00	
	60,482.84	

Counsel for plaintiff then offered in evidence a letter from Charles G. Dawes dated April 7, 1898, to Charles H. Baker, Receiver, and the same was admitted and marked Plaintiff's Exhibit 10.

Plaintiff's Exhibit 10 [Letter, Dated April 7, 1898, Comptroller of the Currency to Charles H. Baker, Receiver.]

TREASURY DEPARTMENT.

Office of
Comptroller of the Currency.

Address Reply to
Comptroller of the Currency.

Washington, April 7, 1898.

Mr. Charles H. Baker,
Receiver, Merchants' National Bank,
Seattle, Wash.

Sir: Referring to the report of Mr. William R. Seeley, Special Examiner, under date of October 9, 1897, he states that it is the judgment of the Receiver and his attorneys, that you as Receiver have full power and authority to compromise and sell the remaining assets of your trust, then remaining your hands; that it is your judgment that you should be authorized to compromise and sell privately, the 'bad and doubtful assets' remaining in your hands, as in your opinion it shall be for the [107—21] interest of the trust.

The Examiner states, that he, in connection with your attorneys petitioned the U. S. Court and obtained an order granting you this power.

You are hereby directed to make a schedule of all the assets which you have compounded and sold under this order from the date of October 1, 1897, to the present time. You will give the name of the purchaser, the character of the asset, and the prices which you have obtained.

You are further instructed that you will hereafter make no sale of assets, under this order, until the proposition has been submitted to the Comptroller.

This office must be kept advised of all compromises proposed and you are required to have the sanction of the Comptroller before presenting your petition to the court for any settlement by compromise.

Upon receipt of this letter you will inform me what settlements you have made since the order was granted and if you have any propositions pending at this time.

Very respectfully,

CHARLES G. DAWES,
Comptroller.

Counsel for plaintiff then offered in evidence the answer of Baker, receiver, to the letter of Charles G. Dawes, which answer bears date April 19, 1898, and the same was admitted in evidence and marked Plaintiff's Exhibit 11.

Plaintiff's Exhibit 11 [Letter, Dated April 19, 1898, Charles H. Baker, Receiver, to Comptroller of the Currency].

No. 2985.

THE MERCHANTS' NATIONAL BANK.
CHAS. H. BAKER,
Receiver.

Seattle, Wash., April 19th, 1898.

Hon. Charles G. Dawes,
Comptroller of Currency,
Washington, D. C.

Office Comptroller
Apr. 26, 1898,
of Currency.

Dear Sir:—

I am in receipt of your letter of the 7th, revoking the order of your predecessor relative to the com-

pounding and settlement of bad and doubtful assets.

In accordance with your request I enclose herewith a list of the statement made under the previous order and also of negotiations pending along the same line. The latter, if successful, I will in accordance with your instructions submit for your approval.

Yours truly,

CHAS. H. BAKER,
Receiver. [108—22]

Does your order contemplate covering collateral securities? There is a vast lot of these of diverse character. Settlements under this head I did not include in enclosed list, but will make a separate one if desired.

No. 2985.

MERCHANTS' NATIONAL BANK.
CHAS. H. BAKER,
Receiver.

Office Comptroller
Apr. 26, 1898,
of Currency.

Seattle, Wash.

List of Assets Compromised by the Receiver of the Merchants' National Bank of Seattle, Washington Since Oct. 1st, 1897.

Date.	Kind of Asset.
Oct. 14, '97.	(Collateral) to Stock & Securities (Doubtfull) $5876.78 Okanogan Co. Warrants—Sold to Heller Lyons & Co. of Tacoma Wash. at 75cts.
" 28, '97.	(Collateral) to Bills Rec. (Doub.) & 1330c & Interest Port Angeles School Warrants. Sold to W. D. Perkins & Co. of Seattle at $1.05 flat.
Nov. 27, '97.	Bills Rec. (Good) Compromise with Mark Ten Eue for the payment of the balance of his note of $300/00 and Inst.—$5.00.

Dec. 19, '97. Bills Rec. (Doubt.) Compromise on J. O. Young's $400.00 note and Interest & cost—$114.00 in Inst.

Jan. 1, '98. Additional Assets (Doubt.) Compromise on C. Allison note of $1119.65 and Inst. for $500.00 cash.

Feb. 28. '98. Bills Rec. (Good) J. M. Boyd et ux. note $1350.00 Inst. 12% Inst. compromised to 6% upon the prompt payment of the principal, interest and cost amounting in all to $1609.75.

Compromising of Claims Pending.

Bills Rec. (Doubt.) A. S. Taylor of Everett, Washington, Note $3000.00; his offer of $1000.00 has been accepted. See letter of the Comptroller of Oct. 19, 1897.

No. 2985.

THE MERCHANTS' NATIONAL BANK.

CHAS. H. BAKER,

Receiver.

Office Comptroller.
Apr. 26, 1898,
of Currency.

Seattle, Wash.

Exchanges Made of Real Estate, etc., for Receiver's Certificate [109—23] by Chas. H. Baker, Receiver, Since Oct. 1st, 1897.

Date.	Kind of Asset.	Name.	Amt. of Balance Due on Rec. Certfs.
Nov. 30th, '97.	Real Est. for Rec. Certf., lots 14 & 15 Denny & Hoyt's Addition to Seattle.	Emma J. States....	$ 601.32
Nov. 30th, '97.	Real Est. for Rec. Certf., 101 Acres of uncleared land in Sec. 8, Township 24, Range 7 East.	E. L. Tapert.....	3167.92
Dec. 1st, '97.	Clallam Co. Warrants for Rec. Certf. $50.00 in cash.	and W. D. Perkins & Co. Assignee	94.89

Date.	Kind of Asset.	Name.	Amt. of Balance Due on Rec. Certfs.
Dec. 13th, '97.	Real Est. for Rec. Certf. lots 29, 30, 31 & 32 Randell's Addition.	E. Fobes.....	440.18
Feb. 19th, '98.	Real Est. for Rec. Certf. lots 6, 7, & 8 Randell's Addition.	Wash. Lumb. Co...	359.47
Feb. 28th, '98.	Real Est., for Rec. Certf. and $119.00 in cash—lots 5, 6, & 7 Mackinzie & Dempsey's Addition—	John Swanson	387.87
Mach. 12th, '98.	Real Est. for Rec. Certf. and $250.00 in cash, lot 11 A. A. Denny's Addition.	Margaret A. Donlan.	1523.90
Mch. 20th, '98.	Real Est. for Rec. Certf. lot 9 Randell's 3d Addition.	John Swanson.....	394.72

All Real Est. exchanged was based upon a valuation of 20% for Rec. Certfs. [110—24]

[Testimony of Francis Rotch, for Plaintiff.]

FRANCIS ROTCH was then called as a witness on behalf of the plaintiff and testified as follows:

That he had lived in the State of Washington for 26 years; was a lumberman by occupation; that he has resided in Seattle for 17 years, having come to Seattle in 1896. He testified that he was acquainted with Sol G. Simpson in his lifetime. That Mr. Simpson was a logger, and that he died in 1906. The witness testified that he had worked for Mr. Simpson, commencing that employment in the fall of 1898 and remained in his employ until Mr. Simpson died. The witness stated that he was first manager of the shingle department of the Simpson Logging Company, and after that he was Mr. Simpson's private secretary and bookkeeper, becoming that in

(Testimony of Francis Rotch.)

1899, and that he had kept the books of Mr. Simpson. The witness testified that he had known the defendant Baker for about the same length of time as he had known Mr. Simpson, and that Baker and Simpson saw each other frequently.

The witness then testified as follows:

"Q. While you were in the employ, in those years, of Mr. Simpson, do you know whether or not, during that time, he had ever had any personal interest in block 430 Seattle tide lands—answer that yes or no—did you learn during those years whether he had any interest in block 430 Seattle tide lands?

A. I am to answer that yes or no?

Q. Yes. A. Yes.

Q. How did you get the information?

A. Well, it is a good many years ago.

Q. I mean how, by letter or by conversation.

A. It was in conversation with Mr. Simpson.

Q. How many conversations did you have with Mr. Simpson about the ownership of block 430, if you recall?

A. I can remember two all right enough.

Q. About when was the first one? [111—25]

A. That was when I paid an installment to Bob Bridges, the Land Commissioner, I think it was in 1900, I should say somewhere about the last of 1900.

Q. State the conversation you had with Mr. Simpson at that time about block 430, to the Court.

Mr. SHANK.—At this time I object to any statements made by Mr. Simpson as irrelevant, immaterial and incompetent and not provable in this manner, and I desire a general exception to the proving

(Testimony of Francis Rotch.)

of any statements of a man after he has been dead for a number of years, seven years, as manifestly unfair and improper and therefore I make this objection.

The COURT.—I will let it go into the record so that you can take the record to the court of appeals.

Q. (Mr. KELLEHER.) State the first conversation, as nearly as you can, Mr. Rotch.

A. Mr. Simpson was turning a great many things over to me, and of course I opened a great deal of his mail, unless it was marked 'personal,' and I came across a notice from the Land Commissioner saying that there was a payment due, an interest payment, on block 430, and so I went to Mr. Simpson and asked him whether I should pay it or not.

Q. What year was this?

A. That was in 1900; the end of 1900. I have refreshed my memory about that. He said, 'Yes,' he said, 'pay that,' he says, 'but that belongs to Charlie Baker,' and then I said, 'Shall I pay it?' and he said, 'Yes, pay it.' And then I paid it and I made the entry of it in my books, and charged Mr. Baker with that payment. And that was all the conversation we had at that time, as I remember it.

Q. Did you have any other conversation with him about block 430? A. Yes, sir.

Q. When was that, to the best of your recollection?

A. Well, I think it was about two years later.

Q. State the substance of that, as nearly as you can.

A. It came up again about two years later, I think

(Testimony of Francis Rotch.)

in 1902, I am not quite certain about that, and Mr. Simpson was hard up in those times; he had a good deal of property, but he did not have much ready money, and we had been selling off quite a lot of his property in order to obtain money, and I went to him again and I said, 'Now, can't we get rid of this block 430?'—I thought maybe at that time probably he got it from Baker, or something of the kind. He said, 'No, Mr. Baker put that in my hands [112—26] and I have held it in trust for him right along,' he said, 'We can't dispose of that.' And then we went over some other pieces of property at that time and decided to dispose of some of the Union Addition; and that is all I remember about that, but it impressed it rather indelibly on my mind.

Q. That was the only conversation—you never had a later one that you recall?

A. I cannot recollect any more than that.

Mr. KELLEHER.—That is all.

Cross-examination.

Q. (Mr. SHANK.) Mr. Rotch, when did these conversations—I mean when did you recall that you had these conversations?

A. When did I recall them?

Q. Yes.

A. I think when you and Mr. Kelleher asked me about it, I ran back in my memory and they came up, that is all.

Q. I visited you, didn't I, at one time and I asked you whether you recalled anything that was said or done and you stated that you did not have any recollection of it, didn't you, at that time?

(Testimony of Francis Rotch.)

A. At that time I probably did, because this is the first that it had been brought to my attention.

Q. And this was about three months ago that I called on you and asked you those questions?

A. Three or four months ago, I could not say when.

Q. And since that time you have recalled it and told Mr. Kelleher of the fact?

A. Yes, Mr. Kelleher asked me about it also.

Q. The first statement was made by Mr. Simpson in 1900? A. That was in 1900, yes, sir.

Q. And the second statement was made about two years later? A. Yes, sir, about 1902.

Q. And you have stated all that he said, have you?

A. All that I can remember, Mr. Shank.

Q. When did you recall this after my conference with you—how long afterward did you recall these conversations?

A. I think about a week after I saw you, Mr. Bausman spoke to me and asked me about it and I said Mr. Shank had already asked me about that, and I tried to look up [113—27] some records, or see if I could recall something about that, and I went to what records I had there—merely the ledger 'B,' and I looked it up, and I remembered then of those two conversations I had, when I saw the entries in there, because I remembered the last one especially.

Q. Didn't you tell me at that time, Mr. Rotch, that you didn't have any records?

A. No, I did not—at least you must have misunderstood me if you got that idea.

Q. That you had no records and there was neither

(Testimony of Francis Rotch.)

head nor tail to any of his records that he ever had kept?

A. I think you are mistaken. Of course I had no records in my own possession.

Q. Didn't you also tell me at that time that Mr. Simpson conducted his business in such a very loose manner that you had neither head nor tail to the matter; that he would come in and report to you that he had paid a certain thing out of his pocket?

A. Yes, sir.

Q. And there was no system about his method of keeping books?

A. That is perfectly true—very often he did that.

Q. And you do not recall telling me that you did not have any books at that time?

A. No, I never said that.

Q. I so understood you.

A. No. I am sorry you misunderstood me.

Q. These conversations did not occur to you as having been had until Mr. Bausman called on you?

A. No; I cannot say that they did, because I took no very great interest in it, but I tried to think afterwards about it, and I referred my mind—I let my mind go back one step after another, and I did recall these conversations.

Q. As nearly as you can remember, you have stated all that was said?

A. All that I can remember, yes. I do not remember anything else.

Q. And it was about in the manner in which you have stated it?

A. Along those lines, yes.

(Testimony of Francis Rotch.)

Q. And what was Mr. Simpson's business? [114—28]

A. Why, Mr. Simpson was a logger; he was president of the Simpson Logging Company and he also was the owner of the White Star Steamship Company.

Q. He was one of the leading loggers, if not the leading logger, on Puget Sound at that time?

A. Yes, sir, he was.

Q. He had large interests scattered all over the Sound; isn't that a fact?

A. Yes, he had interests, yes.

Q. And his transactions reached into the thousands of dollars? A. Yes, sir, a great many.

Q. And his method of handling his business was a very loose, careless method?

A. I would not say that in this way, because every portion of his business took care of itself in that way that the business was handled by his subordinates; for instance, in the steamship company business that was handled by one class of subordinates and the logging business by another and his personal business was handled by himself.

Q. He had been here on the Sound how long?

A. I don't know.

Q. You first became acquainted with him in 1896?

A. 1898.

Q. He was at all times reckoned as a man of sterling integrity and honor? A. You bet he was.

Q. And he was known for his upright and proper dealings? A. Everywhere he was.

Q. Isn't that a fact? A. Yes, sir.

(Testimony of Francis Rotch.)

Q. He was never at any time associated with or connected in any way, directly or indirectly, with any effort to conceal, defraud or otherwise do harm in a business transaction?

A. No, sir, he was not that kind of a man.

Q. Mr. Rotch, he was a very generous man also, was he not? A. He was.

Q. And with his friends he was most generous; isn't that a fact? [115—29] A. That is true.

Q. And when he was generous with a man he practically had no limit to his generosity; isn't that a fact?

A. I don't know what his limit was, but he used to go pretty strong.

Q. Now, in handling matters with his friends, he did not seek to drive bargains with them but always dealt with them on a generous and proper business basis; isn't that a fact?

A. I always found him that way.

Mr. SHANK.—That is all.

Redirect Examination.

Q. (Mr. BAUSMAN.) Just the same, he told you, in substance, that he was carrying that property for Charlie Baker, or words to that effect.

A. Yes, sir.

Q. And that he never had any interest in it?

A. Yes.

Mr. SHANK.—No, he didn't say that.

Mr. BAUSMAN.—He said so now.

Q. Now, Mr. Rotch, in order to explain about these books. When Mr. Shank first called on you you had not looked up the records to refresh your

(Testimony of Francis Rotch.)

memory; isn't that true?

A. I hadn't seen them since I left.

Q. And when you spoke of not having books, you meant you personally didn't have the custody of them? A. No, I had nothing to do with them.

Q. Now, in that one interview you had with me, that was about the time that Charles H. Baker was examined here as a witness.

A. I don't remember.

Q. Well, it was back in October?

A. I didn't know that Mr. Baker was examined.

Q. And whatever books and records are left behind in this matter, are in the possession of Mr. Force, the executor of the estate of Sol. G. Simpson?

A. Yes, sir.

Q. And of Mr. Mark Reed, his son in law?

A. Yes, sir. [116—30]

Q. (Mr. SHANK.) Mr. Rotch, to get at this matter exactly, you mean now to state, as a part of this record, that he told you that he never had any interest in that property—do you mean to say that Mr. Simpson told you in the conversation in 1902 that he never had any interest in this property?

A. That is what he said.

Q. That he, at that time, did not have any interest, or that he never had?

A. I charged it up to Mr. Baker's account.

Q. Did he tell you that he never had had any interest in the property, or that he didn't have an interest at that time in the property?

A. That I could not say; that was a long time ago, and I could not say.

(Testimony of Francis Rotch.)

Q. Well, which way do you want the record to stand? A. I don't care.

Q. You can't say? A. No. [117—31]

Q. You cannot say whether he stated to you that he did not at that time have any interest or that he never had had any interest?

A. It is pretty hard to say, I am sure, whether—but he said, 'I had this trust with Mr. Baker.'

Q. Do you want to state now that so far as your recollection goes you do not recall whether he stated that he had never had any interest or that he did not at that time have an interest?

A. No. My recollection is he said he never had any interest in that property.

Q. You want that to go now of record as his statement to you?

A. Yes, because that is my recollection.

Q. And that you are certain about that?

A. Yes.

Q. Why are you so certain about that, particularly?

A. Because I remember—because it just bore out what he said the first time. He said, 'That belongs to Charlie Baker,' that was in 1900.

Q. Yes, that was all right, but suppose Charlie Baker had acquired that property in 1899, wouldn't that same statement be consistent with that fact?

A. I don't know, I am sure I can't tell, Mr. Shank.

Q. Mr. Rotch, is it not consistent with the fact that if Charles Baker had acquired that property in 1899 that Mr. Simpson may have said in 1902 that he did not have any interest in that property at that time.

(Testimony of Francis Rotch.)

A. That Mr. Baker didn't?

Q. That he, Mr. Simpson, didn't.

A. It may have been, surely."

And that the witness, on further examination, did state that he unequivocally stood upon the statement that Simpson in 1902 had said to him that Baker never had any interest in the property. [118—31a]

[Testimony of Lester Turner, for Plaintiff.]

LESTER TURNER was produced as a witness on behalf of the plaintiff and testified that he had lived in Seattle since 1889. That during 1896 and for several years subsequent thereto he had been in the banking business; at first he was cashier and subsequently president of the First National Bank of Seattle, of which Sol G. Simpson was a stockholder and a director. That Simpson and Baker were friendly.

Q. Did you ever have any conversation with Mr. Simpson about tide lands, and especially about those that are under discussion in this case—answer that yes or no. A. Yes.

Q. Will you state the first conversation that you had with him, and the time?

A. I cannot state with accuracy in regard to the time; I know it was after the Klondike excitement began and when things began to revive in Seattle.

Q. The Klondike excitement to which you refer was July, 1897? [119—31b] A. Yes.

Q. And you had the conversation with him after that, did you? A. Yes.

Q. Can you give the exact time?

(Testimony of Lester Turner.)

A. No, I cannot.

Q. Approximately, would you say about what year?

A. I should say 1888 or 1889, or somewhere along there.

Q. You mean 1898-9? A. 1898-9, yes.

Q. Was the name of Charles H. Baker mentioned in that conversation? A. Yes.

Q. State the substance, as best you can recall it, of that conversation.

Mr. SHANK.—It is understood we make the same objection to all this line of questions.

The COURT.—Yes—it is received under the same statement.

A. (By the WITNESS.) The conversation came up in this way. I was talking to Mr. Simpson in regard to tide-land holdings that the bank held—it owned quite a large amount of tide land, and he was a director of the bank and I talked to him about the affairs of the bank, and in that connection I asked him about his own holdings down there. I knew that he held some tide lands, and he told me that a portion of those lands belonged to Charlie Baker, that he was carrying the title for him, to accommodate him. I do not remember anything—

Q. (Interrupting.) That was the substance of it, as nearly as you can recall? A. Yes.

Q. Give the next conversation and the date of that, if there was a next one.

A. Well, I don't know, but it was some time after the first and within a year or two, I do not recall, though.

(Testimony of Lester Turner.)

Q. What was the substance of that conversation, Mr. Turner?

A. I do not know the occasion of it—I do not remember the occasion of it, but it occurred in the bank. It was with reference in some way, incidentally, to the properties, and I asked him how he came to hold the title to that property that belonged to Baker. Well, he said [120—32] "Baker didn't want it known that he had taken the property while he was receiver of the bank, and it might not bear investigation," and he was carrying it for him for that reason.

Cross-examination.

Q. (Mr. SHANK.) The first conversation which you referred to you say was in 1898 or 1899, or thereabouts? A. I think so.

Q. You are not certain as to just which year it was? A. No.

Q. It might have been as late as 1900, might it not?

A. Possibly; I don't think it was that late, however.

Q. You say probably in 1899.

A. I think it was in 1898 or 1899.

Q. And the conversation at that time was that he was carrying the title for Mr. Baker? A. Yes.

Q. And now the other conversation which took place was a year or two after that. A. I think so.

Q. And at that time he stated that he was still carrying the title for Mr. Baker, or words to that effect.

A. Yes. I think he stated also that he had made him advances on it, or helped him, or assisted him in

(Testimony of Lester Turner.)

carrying it, or something of that kind.

Q. Did he at that time say anything further to you with reference to the details of the matter?

A. I do not recall anything further.

Q. Now, Mr. Simpson was a man who stood high in the community, wasn't he? A. Yes.

Q. His honor and integrity was unimpeachable as a citizen? A. Yes.

Q. And his dealings were likewise unimpeachable?

A. Yes, sir. [121—33]

Q. For honor and integrity? A. Yes, sir.

Q. And he was generally recognized as a dependable, upright citizen? A. He was, yes.

[Testimony of Mark E. Reed, for Plaintiff.]

MARK E. REED was produced as a witness on behalf of the plaintiff and testified that he had been born in the state of Washington. That he was the son in law of Sol. G. Simpson and held a power of attorney from him. That he was likewise acquainted with the defendant Baker. That he was a logger by business, and that he was a member of the board of the State Capital Commission. That he had caused the records and files to be searched for papers and documents bearing upon block 430, and the transaction between Mr. Simpson and Mr. Baker with reference thereto. That his first business with Mr. Baker regarding this block was early in the year 1905. The witness then identified a letter from Baker dated May 9, 1904, and the same was admitted in evidence and marked Plaintiff's Exhibit 12, and reads as follows:

Plaintiff's Exhibit 12 [Letter, Dated May 9, 1904, Chas. H. Baker to Mark Reed].

THE OVERLAND LIMITED

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Every day in the year

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CHICAGO & NORTH-WESTERN

UNION PACIFIC and SOUTHERN PACIFIC

Railways.

May 9th, '04.

Mr. Mark Reed,

Seattle.

Dear Sir:

I had a talk with Mr. Simpson in S. F. about the tide land which he holds in trust for me. I asked him if he would take my note in settlement of the advances he has made, together with the interest accrued thereon. The first 2 or 3 payments I made myself. Mr. Simpsons books however will show the status of the account. There is one more payment [122—34] due next March to complete the contract with the state. Mr. S. stated that you held his general power of attorney and would assign the certificate back to me or my order. I wish you would compile a statement of the account I owe to Mr. Simpson and send same to Chicago, and I will send you from there a form of assignment to execute, together with note for the account, due 1 year after date, which plan Mr. S. consented to and will doubtless advise you to that effect.

I may be away several months and I may have occasion to use the item, or dispose of it, and so I think it had better be put in the shape indicated.

My address will be as below.

Yours very truly,

CHAS. H. BAKER,

Auditorium Annex,

Chicago.

I believe there is an item to my credit also of a certain sum for right of way across the tract sold to the N. P.

Plaintiff's counsel then offered in evidence a letter from Charles H. Baker to the witness dated November 21, 1904, the same being admitted and marked Plaintiff's Exhibit 13, and reads as follows:

Plaintiff's Exhibit 13 [Letter, Dated November 21, 1904, Chas. H. Baker to Mark Reed].

THE STILWELL-BIERCE & SMITH-VAILE CO.

Dayton, Ohio, Nov. 21, 1904.

Mr. Mark Reed,

Union Block,

Seattle, Wash.

Dear Sir:

I have not yet received statement of payments which Mr. Simpson made upon the Tide Land Block. This, doubtless, has escaped your attention. Will you not forward it to me at your early convenience at 608 Home Insurance Bldg., Chicago, Ill.

Yours truly,

CHAS. H. BAKER. [123—35]

Counsel for plaintiff then offered in evidence a letter dated July 7, 1904, written by Charles H. Baker to Saul G. Simpson, which was admitted and marked Plaintiff's Exhibit 14, and is as follows:

Plaintiff's Exhibit 14 [Letter, Dated July 7, 1904, Chas. H. Baker to Saul G. Simpson].

Chicago, Ill., July 7, 1904.

Mr. Saul G. Simpson,
Union Block,
Seattle, Wash.

Dear Mr. Simpson:

I am sorry that you did not send me declaration of trust concerning tide land lot, which I wrote you about, and which you told me in San Francisco you would attend to. I wanted to use the paper for the purpose of borrowing some money but did not have it.

I will be back in Seattle in two or three weeks. I hope you are much improved in your general health.

Yours very truly,
CHAS. H. BAKER.

Counsel for plaintiff then offered in evidence a letter dated January 31, 1905, from Charles H. Baker to Sol. G. Simpson, which was admitted and marked Plaintiff's Exhibit 15, and is as follows:

Plaintiff's Exhibit 15 [Letter Dated January 31, 1905, Chas. H. Baker to Sol. G. Simpson].

SNOQUALMIE FALLS AND WHITE RIVER POWER COMPANY.

In replying to this letter
please refer to these
initials and number—
C. H. B.

Seattle, Washington, Jan. 31, 1905.

Mr. Sol. G. Simpson,
Seattle, Washington.

Dear Sir:

In regard to the tide land block 430 which you have been carrying for me, please make the assignment of contract [124—36] of the same to Algernon S. Norton of Suffern, New York, and this letter will be your authority for so doing. Also assign lease No. 181 to same party.

Very truly yours,
CHAS. H. BAKER.

Counsel for plaintiff then offered in evidence a letter dated August 8, 1905, from Baker to Simpson, and the same was admitted in evidence and marked Plaintiff's Exhibit 16, and reads as follows:

Plaintiff's Exhibit 16 [Letter, Dated August 8, 1905, Chas. H. Baker to S. G. Simpson].

Seattle, Aug. 8th, '05.

Mr. S. G. Simpson,
City.

Dear Sir:

This will authorize you to transfer contract No. 738 covering Block 430 of Seattle Tide Lands, to A. S. Norton.

Yours truly,
CHAS. H. BAKER.

The witness then testified that as a result of these demands by Baker, that he transferred the property to A. S. Norton, whose name was given him by Mr. Baker. The witness further testified that he had sent to the Land Office and had the deed issued, and that on August 8, 1905, he received a letter from E. W. Ross, which was admitted in evidence and marked Plaintiff's Exhibit 17, and reads as follows: [125—37]

Plaintiff's Exhibit 17 [Letter, Dated August 8, 1905, E. W. Ross, Commissioner, to Sol. G. Simpson].

STATE OF WASHINGTON,
Department of Public Lands.
Office of Commissioner,
Olympia, Wash.

E. W. ROSS, Commissioner.
H. P. NILES, Assistant Commissioner.

August 8, 1905.

Mr. Sol. G. Simpson,
Union Block,
Seattle, Washington.

Dear Sir:

Replying to your request by telegraph, to obtain deed on your contract No. 728, Seattle Tide Lands, remit principal $990.60; interest to August 15, $86.68; fee for deed $2.00, total $1079.28.

You must also inclose the original contract of sale and certificate from the county treasurer that all taxes are paid on this property.

Very truly yours,
E. W. ROSS,
Commissioner.

Mr. H–Mc.

Counsel for plaintiff then offered in evidence a letter dated August 15, 1905, from H. P. Niles, Assistant Commissioner of Public Lands, to the witness, and the same was admitted and marked Plaintiff's Exhibit 18.

Plaintiff's Exhibit 18 [Letter, Dated August 15, 1905, H. P. Niles to M. E. Reed].

STATE OF WASHINGTON,
Department of Public Lands.
Office of Commissioner,
Olympia, Wash.

E. W. ROSS, Commissioner.
H. P. NILES, Assistant Commissioner.

August 15, 1905.

Mr. M. E. Reed,
1310 Alaska Building,
Seattle, Washington.

Dear Sir:

This department is in receipt of yours of the 11th inst., enclosing $1077.28, in final payment for a [126—38] deed on block 430 Seattle Tide Lands, covered by contract No. 728, and standing on our records in the name of S. G. Simpson. The amount remitted pays in full balance of principal and interest on contract. You state, however, that the contract has been assigned to A. S. Norton; it will, therefore, be necessary for you to remit an additional fee of $2.00 for issuing deed and $1.00 fee for approval of the assignment.

You must also send us the original contract of sale with said assignment attached thereto and a certifi-

(Testimony of Mark E. Reed.)

cate from the county treasurer of King County, that all taxes are paid on this property.

Very truly yours,

H. P. NILES,

Assistant Commissioner.

Mr. H–Mc.

The witness stated that the defendant Baker furnished him the money to make final payment to the State of Washington, the check being for the sum of $1,077.55. The witness then testified as follows:

"Q. And in settling up, in all he paid you about how much, in addition to the money to go to the state land office?

A. My recollection is about two thousand dollars.

Q. Over and above this $1,077?

A. Something like that. There was a lease of the waterway in front of the lots that Mr. Simpson had acquired in his own name, and I insisted that Mr. Baker should take that lease along with the block and pay for the lease. I remember we had some dealings backwards and forwards in arriving at a settlement as to the price of the lease.

Q. You had conversations with Mr. Baker then at the time of this settlement, did you? A. Yes.

Q. Did you receive for this land which you were releasing in 1905 anything else than your advances?

A. No, sir.

Q. And what was the conversation with Mr. Baker about the settlement of those advances?

A. Well, that he must pay the advances that Mr. Simpson had made for the tide-land blocks; whatever he had paid to the state land office and the taxes

(Testimony of Mark E. Reed.)

and six per cent interest on it. [127—39]

Q. It was vacant, unimproved tide land, I understand it? A. Yes, sir.

Q. Did Mr. Baker want to do that?

A. (Continuing former answer.) —and that he should, in addition to that, pay the amount which we should agree on for this tide-land lease, or harbor area lease, which was in front of it.

Q. Known as No. 181?

A. I don't remember the number of it.

Q. In front of block 430? A. Yes.

Q. Then you settled for block 430 by simply reimbursing you— A. Yes.

Q. Did Mr. Baker want to give you money or not?

A. Well, there was some talk about a note.

Q. You would not take his note?

A. No, I insisted on the money.

Q. Because you had no confidence in him?

Mr. SHANK.—I object to that.

A. Well, I wanted the money.

Q. (Mr. BAUSMAN.) What was the reason you would not take his note, Mr. Reed?

A. I wanted money.

Q. You preferred money to Mr. Baker's note—why did you prefer the money?

Mr. SHANK.—That is objected to.

The COURT.—The objection is sustained.

Q. (Mr. BAUSMAN.) Now, did you ever have any conversation with Mr. Simpson about that property? A. Yes.

Q. What is the earliest time you can recollect talking to him about it?

(Testimony of Mark E. Reed.)

A. About the—well, it was in January or as early as—well very soon after the year 1904. At that time I took charge of all of Mr. Simpson's property, and this matter was listed as among the assets.

Q. In 1904 it was listed as one of the assets, and you [128—40] naturally talked then with Mr. Simpson about it, did you? A. Yes.

Q. Was he in ill health? A. Yes.

Q. And departed to California, didn't he?

A. Yes.

Q. Did he go through the general amount of his estate with you? A. Yes.

Q. And he mentioned block 430?

A. Yes, sir.

Q. Whose did he say it was?

A. It belonged to—

Mr. GROSSCUP.—I suggest that that question is leading.

Mr. BAUSMAN.—Under the issues in this case I should not think you would want to keep anything out.

Q. What did he say about block 430?

A. He said 430 belonged to Charles Baker.

Q. Did he convey any impression to you that Mr. Baker had some years before that bought it back?

Mr. SHANK.—I object to that as irrelevant, immaterial and incompetent.

The COURT.—I will sustain the objection as to what impression he conveyed, he can state what he said.

Q. (Mr. BAUSMAN.) What was said about that land, so far as you recollect?

(Testimony of Mark E. Reed.)

A. I do not remember anything, except that in describing that with some other land that he held in trust, he said, 'Now, these West Seattle tide lands belong to Charlie Baker,' that was about it. He said, 'When you are reimbursed for the amount we paid out on it you transfer it.'

Mr. BAUSMAN.—That is all."

On cross-examination the witness identified a letter under date of August 11, 1905, being a letter from the witness [129—41] to the land commissioner, and the same was received in evidence and marked Defendants' Exhibit "A," and reads as follows:

Defendants' Exhibit "A" [Letter, Dated August 11, 1905, M. A. Reed to E. W. Ross].

SIMPSON LOGGING CO.
Room 1310 Alaska Bldg.
16 Union Block.
Seattle, Wash., Aug. 11th, 1905.

Hon. E. W. Ross,
Commissioner of Public Lands,
Olympia, Wash.

Dear Sir:

Enclosed you will find check on the Washington Natl. Bank of Seattle for $1077.28 being full settlement of principal and interest due on Block 430 Seattle Tide Lands covered by Contract #728 originally issued to S. G. Simpson.

Mr. Simpson has assigned this Contract to A. S. Norton and Mr. Norton will in due time send you copy of assignment and request Deed, paying such

fees as may be due your Office for the execution of the Deed.

Kindly return receipt for this payment to S. G. Simpson, 1310 Alaska Bldg., Seattle.

Respectfully yours,

M. A. REED.

Received
Aug. 12, 1905.
Commsr. Pub. Land.

Another letter was identified from the witness to the land commissioner under date of August 19, 1905, and the same was received in evidence and marked Defendants' Exhibit "B," and reads as follows: [130—42]

Defendants' Exhibit "B" [Letter, Dated August 19, 1905, M. E. Reed to E. W. Ross].

SIMPSON LOGGING COMPANY.

Shelton, Wash., August 19, 1905.

Hon. E. W. Ross,
Olympia, Washington.

My dear Sir:—

Referring to my letter of the 11th inst., enclosing check for payment of the balance of the principal and interest on tide land Contract No. 728, for block 430 Seattle Tide Lands, as per my telephone message of this date, I have received notice of the protest of the check for $1077.28 given by Mr. Chas. H. Baker, and now desire that you hold all papers in the case and refuse to recognize the assignment of the contract by S. G. Simpson and wife until this payment with costs is covered. I will take the matter up with Mr. Baker at once.

Trusting you will be able to comply with this request, I remain,

Very respectfully,

M. E. REED,

Attorney in Fact for S. G. Simpson.

Received

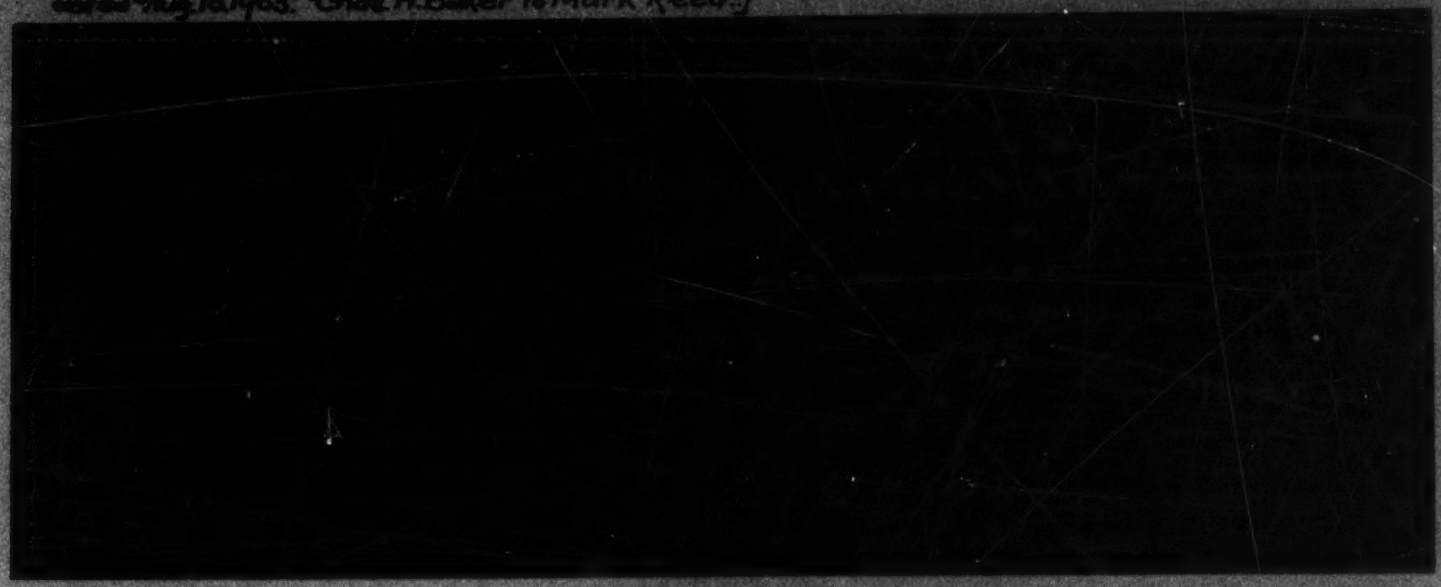
Aug. 21, 1905.

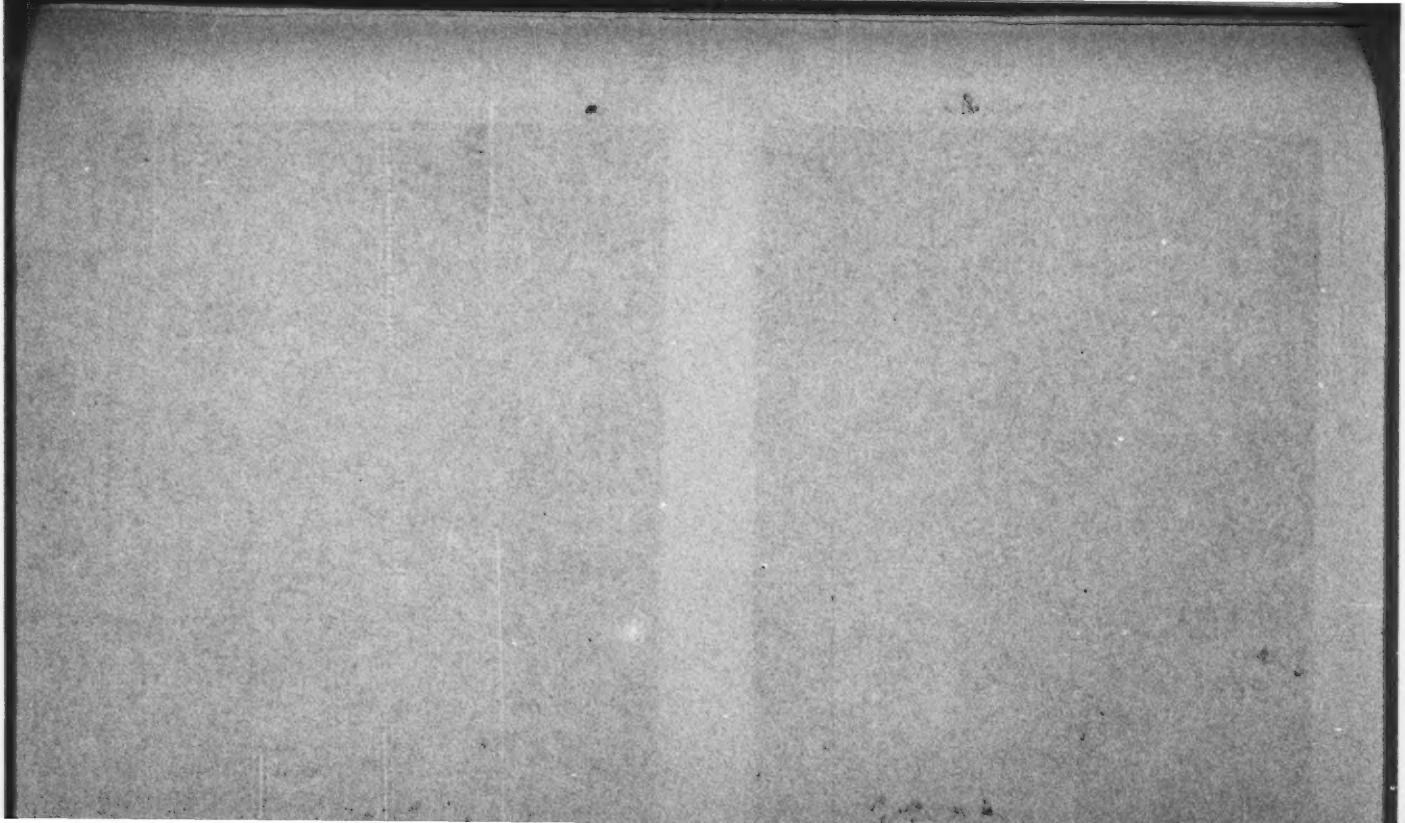
Commsr. Pub. Land.

The witness then testified that these letters were in connection with correspondence which he had had with the land commissioner relating to this property. The witness then identified a certain check and a protest notice attached thereto, and the same were received in evidence and marked Defendants' Exhibit "C." The following is a photographic copy of the check and the indorsements thereon: [131—43]

DEFENDANT'S EXHIBIT C"

Photographic Copy of Check and Indorsements
Jan 3 1923 Chas. H. Baker to Mark Reed.





The protest notice showed that the same was on August 10, 1905, protested by the Washington National Bank, United States Depositary, at Seattle, Washington. That the check was signed by Charles H. Baker. That notice of protest was mailed to Charles H. Baker, Seattle; Mark Reed, c/o Capital National Bank, Olympia; E. W. Ross, c/o Capital National Bank, Olympia, and Capital National Bank, Olympia.

The witness then identified another check dated August 8, 1905, for $2,000, and the same was received in evidence and marked Defendants' Exhibit "D," a copy of which is as follows:

Defendants' Exhibit "D" [Check, Dated August 8, 1905, Drawn by Chas. H. Baker in Favor of Mark Reed].

Seattle, Washington, Aug. 8th, 1905. No.

FIRST NATIONAL BANK

of Seattle.

Pay to Mark Reed or order $2000.00/ Two thousand 00/100 Dollars.

CHAS. H. BAKER.

(Stamped across face of check:)

RECEIVED PAYMENT

Through Seattle Clearing House.

No. Aug. 14, 1905. 2.

First National Bank.

(Punched:) PAID

(Indorsements:) Mark Reed.

(Testimony of Mark E. Reed.)

(Stamped on back of check:)

RECEIVED PAYMENT
Through Seattle Clearing House.
No. Aug. 12, 1905. 4.
Dexter Horton & Co.

The witness then testified:

"Q. That represents the payment, does it, Mr. Reed, made to you—that two thousand dollars represents the payment made to you by Mr. Baker to cover the advances made by Mr. Simpson on block 430, and the consideration which you agreed upon to be paid for the lease of the harbor area, is that correct? [133—45]

A. I am not clear as to that—that that was the entire consideration. My recollection now is that the consideration for the transfer of the harbor area lease and what we had paid out on the lease was two thousand dollars. Now, whether that also included the amount that was due Mr. Simpson for his advances on the block I do not know, but Mr. Baker and myself agreed upon a consideration that was to cover the transfer of the harbor area lease, and that was the main question at issue between us at the time.

Q. That was the main question at issue between you at the time, and you agreed upon two thousand dollars as covering that?

A. That is my recollection of it.

Q. And this is the check that was given in consideration of it? A. Yes, sir.

Q. And that had nothing to do with any accounting for what Mr. Simpson had paid out, or otherwise

(Testimony of Mark E. Reed.)

—that you agreed upon as the price for the harbor area. A. That is as I recollect it.

Q. Did this tax check pass through your hands (showing)—it does not seem to have passed through your hands?

A. I do not know anything about that. I would like to explain myself a little further if I can.

Q. You may do so.

A. I am not exactly clear as to the consideration for the two thousand dollars, whether it also included the advances or whether that was the amount we agreed upon at that time for the harbor area. But that was the settlement that we made at that time.

Q. The point is that you agreed upon a lump sum for the sale of the harbor area to Baker or his assigns? A. Yes, sir.

Q. That had nothing to do with any advances Mr. Simpson had made on that account? A. No, sir.

Q. Your contention now was, Mr. Reed, or rather your idea was that Mr. Simpson owned that harbor area and you wanted to sell it in connection with the transfer of the land?

A. I think so, that was what I told Mr. Baker, that he owned the harbor area and I did not propose to transfer the block back to him unless he took the area, because it was no use to us.

Q. Do you not recall that the protesting of the check at Olympia was explained to you by Mr. Baker at that time as a mere error in his account at the bank?

A. Yes, sir, I think he did. I think he said that

(Testimony of Mark E. Reed.)

someone [134—46] was to deposit money there and he expected it would be deposited to cover the check at the time he drew it, and it was not deposited, or something of that kind.

Q. And it was all satisfactorily fixed up?

A. Yes, it was fixed up."

On redirect examination the witness testified:

"Q. (Mr. BAUSMAN.) To refresh your recollection, though, Mr. Reed, in view of what you said to the Court about your not being clear about this harbor area matter, it seems that there were arrears at the land office, and they amounted to $1,077, and for that Mr. Baker gave a check. You people had been carrying the taxes and the like for years there for Mr. Baker; and there had to be a reimbursement of that, had there not? A. Yes.

Q. Now, then, the harbor area, while you considered it your own, you were instructed by Mr. Simpson, were you not, that that was to go to Baker too in case of a settlement?

Mr. SHANK.—I object to that as leading. I have no objection to his stating what the conversation was.

Mr. BAUSMAN.—State what it was.

A. I do not remember that Mr. Simpson ever gave me any instructions as to the harbor area, and in fact when Mr. Baker brought his letter to me from Mr. Simpson directing me to transfer this property to Mr. Baker, nothing was said of the harbor area and I immediately raised the question, and Mr. Baker and I did not agree, and we had two or three conferences backwards and forwards over it and I insisted

(Testimony of Mark E. Reed.)

that he must take the harbor area. But I do not believe I ever had any instructions from Mr. Simpson as to that. I do not remember that any way.

Q. You recognized that the harbor area without block 430 was practically worthless, didn't you?

A. Yes, sir.

Q. And that when Mr. Baker took back block 430 he should take back the harbor area lease too?

A. Yes, sir, that was the way I insisted.

Q. And then you settled on the gross sum of three thousand odd dollars? A. Yes.

Q. Here is the letter which explains about the checks (showing.) Here is the letter which you received—do you recognize that as a letter from Mr. Baker to you?

A. It is a letter from Charles H. Baker to me, dated [135—47] August 22, 1905."

The letter mentioned was received in evidence, marked Plaintiff's Exhibit 19, and reads as follows:

Plaintiff's Exhibit 19 [Letter, Dated August 22, 1905, Chas. H. Baker to Mark Reed].

HOTEL GRENOBLE,
7th Ave. & 56th Street.
New York.
Frank N. Lord, Jr., Mgr.

Aug. 22, '05.

Mr. Mark Reed,
Seattle.

Dear Sir:

Mr. Hardin wired me that my account in Seattle was insufficient to meet one of the checks I gave you.

I regret that you have been caused any inconvenience and I owe you an apology. I left several checks signed in blank with Mr. Brockett to settle certain matters for me and it seems that these aggregated a higher figure than I anticipated, thus depleting the fund proposed for you. I telegraphed in connection with the matter, which I trust has been straightened out before this. Yours truly

CHAS. H. BAKER.

[Testimony of John A. Paine, for Plaintiff.]

JOHN A. PAINE, produced as a witness on behalf of the plaintiff, testified that he had lived in Seattle for 33 years, and had been in the real estate business 14 years, and was in the real estate business in 1905. That he is acquainted with block 430 of Seattle Tide Lands, and knew what the market value of it was in August, 1905. The witness stated that at that time the value of it was in the neighborhood of $80,000. That he regarded it as the best block west of the West Waterway.

On cross-examination the witness testified that there [138—48] was very little sale for tide lands west of the West Waterway until the spring of 1905.

[Testimony of A. W. Frater, for Plaintiff.]

A. W. FRATER, produced as a witness on behalf of the plaintiff, testified that he had lived in Seattle for 16 years. That he had become receiver of the Merchants' National Bank in April, 1899. That Baker turned over the assets about April 18th of that year. The witness testified that he had forwarded his resignation to the comptroller in 1913. The wit-

(Testimony of A. W. Frater.)

ness further testified that he is the presiding judge of King County.

"Q. When you took charge in April, 1899, did you receive from any source whatever any information to the effect that Charles H. Baker, directly or indirectly, claimed any interest in block 430 Seattle tide lands? A. None whatever.

Q. Have you ever known since, until this suit?

A. No, sir, not definitely, or not at all I might answer that. If you will permit me to explain that.

Q. Yes.

A. It was called to my attention a few days ago that I had granted a divorce for Mr. Baker, and I remembered I did that, from his wife, and that in the decree of divorce there was some stock to some tide land somewhere in Seattle that was set aside to her, but I did not know anything about what the stock represented or what the assets of the company was, I had no knowledge of it whatever.

Q. Refreshing your memory, do you mean the Seattle Waterfront realty stock?

A. I knew nothing about it at all.

Q. And you would not know what particular lots or blocks that company owned?

A. Not the slightest idea and I never did have.

Q. From that time to this you never had any intimation from Mr. Baker, directly or indirectly, or from anybody, that he claimed any interest in block 430 Seattle [137—49] tide lands?

A. Certainly not; I had no occasion to inquire into the matter, and so I never discussed it that I know of.

(Testimony of A. W. Frater.)

Q. You remained the acting receiver from your taking charge in April, 1899, until about what time?

A. The first of July, 1901.

Q. You would occasionally meet Mr. Baker?

A. Very frequently, that is every now and then.

Q. And talk about the affairs of the trust?

A. There was not a great deal—most of the talk I had about the trust was with Mr. Hill rather than Mr. Baker. Mr. Hill had been his bookkeeper.

Q. He stated nothing to you about Mr. Baker—not that I say he knew it—but he said nothing about block 430?

A. I have no recollection of ever having heard anything about it at all."

The witness then testified that after talking over with Mr. L. C. Gilman the matter of the estate's claim against Baker on the $10,000 note it was concluded not worth while to begin suit. The witness said that the supposition was that Baker could not pay it. Baker was heavily indebted or was supposed to be and that they would be unable to collect the account.

On cross-examination the witness testified that while he was receiver he had legal business in Providence, R. I., and in New York State. That A. S. Norton, who had been Baker's attorney while receiver, continued to act as the attorney in these eastern matters during his incumbency of that office. The witness then testified that the business matters with Norton were not closed for some months after his appointment as receiver, and that it might have

(Testimony of A. W. Frater.)

been a year or more. That he personally knew of Mr. Norton's handling these matters, and that he had corresponded with him regarding them. The witness then testified that his commission was sent by the Comptroller of the Currency to Baker [138—50] to be delivered to him.

"Q. It was withheld some time.

A. I think—I don't remember exactly—some four or five or six days after I became appointed I called at his office, but I never could see Mr. Baker, and I called on Mr. Hill a number of times; Mr. Wright I had in charge—he was in the office with me at the time and I employed him as bookkeeper.

Q. About that time was there any tide-land contracts that were up for sale, or tide-land deals that were being closed?

A. I discovered that after I got the books, that there was.

Q. And those tide-land deals were closed about that time?

A. They were closed during the interim, after I had received word from the Department—and a letter from the Comptroller of Currency saying that my commission had been sent to Mr. Baker and I would receive the same.

Q. As I understand it, after you received the letter from the comptroller—

A. Notifying me that my commission had been sent to Mr. Baker.

Q. Notifying you that your commission had been sent to Mr. Baker? A. Yes, sir.

(Testimony of A. W. Frater.)

Q. Mr. Baker had in fact closed certain tide-land deals after that.

A. Yes, that was developed as it appeared from the books.

Q. That fact became known to you after you were appointed receiver? A. Yes.

Q. And then within what time was it?

A. Within a day or two—the same day, perhaps.

Q. Did that create any suspicion on your part as to the *bona fides* of the transaction, or the manner in which it had been handled?

A. That alone did not, no, sir.

Q. Did you have anything else which caused your suspicions to be aroused to these tide-land transactions? A. Well, if you want to know, I did, yes.

Q. What were the tide-land transactions?

A. That was some lots that were sold to Hofius & Company, that is my recollection of it. [139—51]

Q. What block were they in, do you recall?

A. I do not recall the block.

Q. Block 431, wasn't it?

A. The record would disclose that—somewheres over on the west side of the West Waterway.

Q. You then did have your suspicions excited as to these transactions, and that was along about the time, or shortly after your appointment as receiver?

A. I can make that very plain—the whole business, and I wish you would let me do so.

Q. You may do it.

A. My attention was called to the fact about the closing of that deal—

(Testimony of A. W. Frater.)

Q. Which deal?

A. The Pigott-Hofius Company, which was closed, as I remember it—now, I am only going on my recollection—my recollection is that this took place on the 15th day of April, 1901, and it was the Hofius transaction, and the last piece of tide land which had been sold by the receiver, and it was the last tide land that was in the receivership, and that was sold, and on the day or the day after that I became receiver my attention was called to that by Mr. Murphy who was in Preston & Gilman's office at the time and he said these tide lands had been sold at a grossly inadequate price for something like three thousand dollars, and if that matter could be set aside that they would bring a much better price, or ought to have brought at least ten thousand dollars, and I says, 'If that is the case I do not know anything about it at all, and I will submit the matter to Mr. Gilman,' and I talked to Mr. Gilman about it and he wanted to know if I knew anything in the matter which would throw any cloud on it, and I told him I did not know anything about it at all until the matter had been called to my attention, and I would submit it to him as attorney for the trust, and he looked it over and he said it was regular, so far as he could see, and that is all there was about it.

Q. Now, then, subsequently the deal was closed with Hofius and Pigott?

A. No, not subsequently—it was closed previous to my becoming receiver.

(Testimony of A. W. Frater.)

Q. Now, the transaction had been entered upon the books by Mr. Baker or his bookkeeper prior to your taking charge?

A. Yes. There was some correction about it afterwards; I don't recall what it was, because as I say, I have lost the correspondence—the correspondence was all cached away, never dreaming it would come up again, and to get [140—52] rid of the nuisance I buried the whole thing, everything in connection with the Merchants' National Bank, and the receivership, except the journal and the ledger, in an old well about thirty-eight feet deep, and I think the top cover would be about nineteen feet underground—I think it filed it up to within about nineteen feet, and then I covered it with earth, in order to get rid of it."

The witness testified that he had been on the Superior Court bench of King County about nine years, and is the only man who has been upon the bench by that name. That the total dividend declared to the depositors of the Merchants' National Bank was 52%.

On redirect examination the witness testified that the transactions with Hofius and Pigott did not affect block 430, which he stated had been sold to Sol. G. Simpson two years before.

The plaintiff then offered in evidence a letter from Charles H. Baker to Charles G. Dawes, Comptroller of the Currency, dated April 21, 1899, which was received in evidence and marked Plaintiff's Exhibit 20, and reads as follows:

Plaintiff's Exhibit 20 [Letter, Dated April 21, 1899, Chas. H. Baker to Comptroller of Currency.]

No. 2985.

THE MERCHANTS' NATIONAL BANK.
CHAS. H. BAKER,
Receiver.

Office Comptroller
Apr. 27, 1899
of Currency.

Seattle, Wash., April 21st, 1899.

Hon. Chas. G. Dawes,
Comptroller of Currency,
Washington, D. C.

Answered
May 2, 1899.
Insolvent Bank.

Dear Sir:—

Mr. A. W. Frater, my successor in office, has to-day receipted to me for the assets of this trust and has delivered to me his bond in the sum of $25000, properly approved by the Superior Court of this County, and I have delivered to him in accordance with your instructions his commission as receiver and your letter of instructions to him in regard to the conduct of the trust.

Yours respectfully,
CHAS. H. BAKER.

P. S.—I mail concurrent herewith the set of schedules comprising the report from the 1st to the 15th of April, which Mr. Frater has tallied and receipted for; which report I also forward. [141—53]

[Statement of Deposition of Algernon S. Norton.]

The plaintiff then read the deposition of ALGERNON S. NORTON taken in New York on April 21,

(Deposition of Algernon S. Norton.)

1913, before a commissioner. Mr. Norton testified that he had known the defendant Baker since the freshman year in college in 1881. That he had lived in the neighborhood of New York ever since he left college. That he had acted as the attorney for Baker while receiver of the Merchants' National Bank of Seattle with reference to some matters in the east, and that he had continued to act in this capacity for A. W. Frater, who succeeded Baker. The witness further testified that he had had some differences with A. W. Frater, receiver, growing out of the amount of fees which he should charge and the method of payment in connection with certain litigation that he was handling and the manner of paying the same.

The witness testified that he had had business relations with Baker as early as 1904 or 5. The witness testified that the matter of the organization of the White River Power Company was discussed by Mr. Baker with him, and that the witness became the president of this company for Mr. Baker.

The witness testified that in 1905 he received an assignment of tide land contract #728 covering block 430 of Seattle Tide Lands from Sol. G. Simpson. That he paid nothing for this, and that he acted in this regard for Charles H. Baker. The witness did not know how this transfer was paid for —the matter being handled entirely by Mr. Baker. The witness further testified that later the deed was issued to him upon the contract, and that nothing was paid by him therefor, this likewise being

(Deposition of Algernon S. Norton.)

handled by Mr. Baker. Prior to having these titles taken in the witness' name, he stated that Mr. Baker had informed him of his intention in this regard, and the witness testified that Mr. Baker gave as his [142—54] reasons why he wanted the property taken in this way was because of Mr. Baker's intention to go to Korea to be absent some years. He did not carry out his intention of going to Korea. He also stated that Mr. Baker was going to sell the property, and to that end was expecting to list it with real estate agents, and he wanted to be in a position so he could make a transfer. The witness further stated that he had had a course of correspondence with reference to these matters with Norwood W. Brockett, who was Mr. Baker's attorney in Seattle. The witness testified that he did not put up the money with which to pay the taxes, but that the same was furnished by Baker and forwarded by the witness.

The witness then testified that on October 3, 1906, he acquired a 2% interest in this property by purchase. The witness further stated that the Seattle Water Front Realty Company was organized in 1907 at Seattle under the laws of Washington with a capital stock of $250,000, the trustees being George F. Meacham of Seattle, Harry H. Sondheim and Frank Cummings, the last two being connected with the office of the witness. That Mr. Meacham's name was given to the witness by Mr. Baker, and that he first learned of Mr. Meacham through Mr. Baker. The witness testified that as Mr. Baker would hear

(Deposition of Algernon S. Norton.)

from the different real estate agents with whom he would communicate regarding this property that he would bring this correspondence to the witness' office and discuss the matter with him. The witness then testified that when he purchased the undivided 2% interest in this property on October 3, 1906, he took from Mr. Baker a conveyance and an assignment of a 2% interest in the property. That the amount he paid for this was $1000 in cash, and agreed to render such services as might be necessary in taking charge of the property until it was marketed. The witness testified that at the time he took the title to the property in 1905, he executed a declaration of trust to [143—55] Baker, and that it was while he held this declaration of trust that he made this purchase of the 2% interest in the property.

The witness testified that Mr. Meacham received 4 shares of stock, and Albert H. Beebe one share of stock for incorporating the Seattle Water Front Realty Company. There was also one share issued to Harry H. Sondheim and one share to Frank Cummings, simply to qualify them as trustees—these shares having been indorsed in blank and redelivered to Mr. Baker.

The witness testified that on April 26, 1907, a certificate for 30 shares of the Seattle Water Front Realty Company was issued to him instead of 75 shares through an error. That at that time the witness owned a 3% interest in the property, he having purchased an additional 1% interest prior to

(Deposition of Algernon S. Norton.)

the incorporation of the company, so that the total interest which the witness owned in the property prior to the incorporation was an undivided 3%. The witness testified that he gave Baker for the additional 1% interest in the property an assignment of a $2,000 interest in certain claims against the City of New York on which Baker has received up to the present time $600.

The witness testified that after the incorporation of the Seattle Water Front Realty Company, various stock certificates were issued, most of them to the witness, who indorsed the same and turned them over to Mr. Baker. Five certificates for 50 shares each were issued directly to Mr. Baker. One certificate for 250 shares was issued to the Union Savings & Trust Company of Seattle. The witness testified that on April 30, 1907, in order to correct an error in issuing the proper number of shares to him for his undivided 3% interest, an additional 45 shares were issued to him, making a total issuance to him of 75 shares which represented his [144—56] 3% interest in the property that he had purchased and paid for before the incorporation of the company.

The witness then testified as follows:

That one certificate for 24 shares was originally issued to Charles H. Baker, and through a transfer by him issued to Irene Russell Washburn.

That one certificate for 5 shares was originally issued to Charles H. Baker, and through a transfer by him issued to Irene Hoffman.

(Deposition of Algernon S. Norton.)

That one certificate for 5 shares was originally issued to Charles H. Baker, and through a transfer by him issued to Pauline Hoffman. He believed the Washburn and Hoffman shares to be presents from Baker to those persons.

That one certificate for 5 shares, originally issued to Charles H. Baker, was transferred on his assignment to Clay Hardin, the daughter of Thomas B. Hardin who was formerly Mr. Baker's personal attorney.

That one certificate for 10 shares, originally issued to Charles H. Baker, was transfered on his assignment to May L. Norton, the wife of the witness. That this assignment was taken into account in the adjustment of the bill of the witness for legal services rendered to Mr. Baker.

That one certificate for 5 shares was transferred at the request of Mr. Baker to Louise Buchanan.

That on June 14, 1907, the witness purchased from Mr. Baker 50 shares of the stock, being 2% of the whole. That this was in addition to the undivided 3% interest purchased by the witness prior to the incorporation. That he had adjusted various bills with Mr. Baker for legal services in various matters, and this 2%, amounting to 50 shares, was taken in satisfaction of his bill for services, one item of which amounted to $2,500 but was adjusted at $1,250. That [145—57] the settlement was based upon the total valuation of the property of $125,000. That this 2% interest was in addition to the 3% interest the witness had referred to as having been

(Deposition of Algernon S. Norton.)

purchased prior to the incorporation, and made a total holding of 125 shares, 75 shares of which were issued to him in payment of his 3% interest and 50 shares in liquidation of his bill amounting to $2,500. The witness testified that when the corporation was formed no money consideration passed for the original issue of 75 shares—that those shares were issued in consideration of his 3% interest. That the money consideration consisting of services amounting to $2,500 was paid for the 50 shares.

The witness further testified that he sold 5 shares of the 125 shares issued to him to Charles L. Downs for a money consideration.

The witness testified that the balance of the shares were issued to him and the certificates were indorsed by him and delivered to Charles H. Baker.

The witness testified that his present holdings in the company are 120 shares, consisting of the original 125 shares issued to him less the 5 shares sold by him to Charles L. Downs.

The witness testified that at the beginning of the present suit the record holdings were as follows:

George F. Meacham	4 shares
Albert H. Beebe	1 share
Frank Cummings	1 share
Algernon S. Norton	1938 shares
May L. Norton	10 shares
Charles H. Baker	251 shares
Union Savings & Trust Company	250 shares
Clay Hardin	5 shares
Louise Buchanan	5 shares

(Deposition of Algernon S. Norton.)

Irene Hoffman	5 shares
Pauline Hoffman	5 shares
Percival H. Gregory	1 share
Irene Russell Washburn	24 shares
Charles L. Downs	5 shares

[146—58]

The witness testified that the one share issued to Frank Cummings had been transferred to Baker.

The witness testified that of the 1933 shares standing in his name, he personally owns 120 shares and that he is the record holder of 1813 shares for whoever may be the real owner of those 1813 shares, and that he has no knowledge of the ownership, except that he indorsed and delivered them to Mr. Baker.

Plaintiff's counsel then asked the witness the following questions:

Q. Did you ever hear of the Bank of Suffern, New York, the National Bank of Suffern? A. Yes.

Q. Does this corporation owe them any money?

A. No.

The witness testified that the defendant corporation owes Mr. Baker and owes him for money advanced for the payment of taxes and other disbursements. That Mr. Baker had advanced approximately 95%, and the witness had advanced 5%.

The witness further testified that outside of Downs none of the record holders of stock have been officers. That the witness had been president for a number of years. At the corporation meetings the stock was voted in person or by proxy. That the

(Deposition of Algernon S. Norton.)

Union Savings & Trust Company had consulted Mr. Hardin respecting the shares held by it; not as Mr. Baker's lawyer but that Mr. Hardin acted for the Trust Company.

"Q. In making an investment of that kind, had you thought of the title, Mr. Norton, to this property?

A. Yes. I realized that I had the deed myself from the State, the original patent. [147—59]

Q. You knew that this property had been acquired from the assets of the Merchants' National Bank, did you not? A. No. I did not know that.

Q. How did you suppose that Mr. Simpson had acquired it? Did you know?

A. I never knew. I never asked. I did not really take any interest in it. Of course, I took some interest in the property when I acquired a personal holding in it, but at the time I took title for Mr. Baker I gave very little attention to the matter."

The witness testified that he did not know that the property had been acquired through the Merchants' National Bank until the commencement of this suit.

"Q. Were you not struck by Mr. Baker's continued secrecy in this business?

A. I don't think there has been any secrecy.

Q. Have you noticed that he never has permitted his name to be connected with any of the papers connected with this business?

A. That has been true of all the business I ever handled for him—all the companies I handled. No, it did not occur to me. I know when I was in

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Seattle I told various people of Mr. Baker's interest, and I think he has told people of his interest, because he has sent people to me in regard to the matter, talked with them about procuring loans on the property and marketing it.

Q. Is this recently?

A. Oh, at various times, extending way back.

Q. He has never had one share of the stock in his name on the books of this company in six years, has he?

A. Oh, yes; there are 251 shares in his name now.

Q. In his name on the record?

A. Yes, in his name on the records.

Q. When was his name put on the record?

A. * * * On July 15, 1907, he became a stockholder of record.

Q. That is, certificates Nos. 28 to 32? A. Yes.

Q. Those certificates are still out, are they?

A. Yes. [148—60]

Q. Now, these other 1800-odd shares are not in his name, and have never been in his name on the records of the company since they were issued, six years ago?

A. Yes, that's right.

* * * * * * * * *

Q. Did you ever ask Mr. Baker why he did not have the remainder of his 1800-odd shares transferred into his name on the records?

A. No, the subject was never mentioned between us."

The witness then testified that he obtained the abstract to the property shortly after the deed was

(Deposition of Algernon S. Norton.)

issued from the State at the request of Mr. Baker. That he was not originally an officer of the Seattle Water Front Realty Company. That Mr. Baker had always left the details of handling this company and its affairs to him.

Witness Norton stated that all correspondence with the State Land Office and with Meacham of Seattle was conducted by himself; that he knew of no letters written by Baker to those people; that he himself had written perhaps 50 to 100 to Meacham in the course of a year. All communications passed through his (witness') office. Witness did not mention by name any persons who had approached him in connection with the purchase of the land, and being asked whether any such persons had approached him at a period antedating the last three years, replied: "I haven't anything on which I could base any definite statement." [149—61]

The declaration of trust given by Norton to Baker on August 24, 1906, declares in substance that he holds the title to certain tide lands known as block 430, Seattle Tide Lands, for Charles H. Baker, the deed having been executed by the State of Washington on October 16, 1905, and recorded in book 7, page 161 of Tide Land deeds.

The declaration further recites that Norton holds lease #181, Seattle Tide Lands, which lease was originally issued to S. G. Simpson.

"Q. Mr. Norton, have you any other document between you and Mr. Baker attesting any interest of his in the stock, approximately 1800 shares, which

(Deposition of Algernon S. Norton.)

stands in his name on the corporate records?

* * * * * * * * * *

A. No; he has the certificates endorsed by me. I never regarded there was any necessity for such paper or I should have prepared it undoubtedly." [150—61a]

The witness further testified that the books of the company were removed from Seattle immediately after the organization and have been kept in New York under his direction.

The witness further testified that the details at the time of the transfer from the State of Washington were attended to by Norwood W. Brockett of Seattle.

"Q. Are you prepared to say that there was not always around this property a little air of mystery on the part of Mr. Baker? A. Yes.

Q. There was?

A. No, I think there was not.

Q. You think there was no mystery?

A. I might say this: That in all my transactions with Mr. Baker, in his different matters, water power enterprises and other enterprises, that he seemed to be a rather exceptionally reticent man and I would not know about his business myself until there would be some occasion for me to take a hand in it to do something about it, and then I would find out that for a long time, perhaps, he had had an interest in something or been negotiating with something.

* * * * * * * * * *

Q. Did he explain why he did not take title him-

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self and then subsequently convey it to you, if necessary?

A. No, except as I said before, he was contemplating or said he was contemplating—he was all the while talking about going to China and obtaining concessions there in his public utilities enterprises, and that he wanted me to take this title."

* * * * * * * * *

Witness never visited Seattle till 1912. The land is tide land, vacant and unimproved, except in this, that within a year preceding this suit the State began to fill it under the Semple contract, which filling was completed during the suit and lien certificates issued to the contractor for said filling.

On cross-examination the witness testified that his services for Mr. Baker in connection with the Merchants' National Bank were confined entirely to the collection of some eastern collections due to the bank; that he had no personal knowledge of the details of the receivership.

"Q. You may now state to the Examiner what money you have paid out for taxes on this property, giving the dates of payment as shown by the tax receipts to which you may refer to refresh your recollection. [151—82]

A. Now, if I may begin with the earliest—

Q. (Interrupting.) Just give the date of each payment and the amount.

A. About the time I took title to the property Mr. Baker sent to me and asked me to file with the papers the 9 certificates of redemption which I produce here, there being 9 lots in Block 430, numbered from 1 to

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9, consecutively, and these certificates of redemption show the payment by Sol. G. Simpson, for the benefit of Mrs. R. C. Fenner, owner of certificate of delinquency, payment being made on the 11th day of August, 1905, of $73.33 in the case of each of the 9 lots. This receipt is marked 'Paid, August 12, 1905,' or stamped 'Paid, August 12, 1905, Matt H. Gormley, Treasurer, King County, S. M. H.' $73.33 on each lot. Then sometime prior to July 16, 1906, I signed a check and sent it to the treasurer of King County for—I will say that the amount of the checks and the amount of the receipts are not always the same, because if I let the date pass at which the tax could be paid without interest—when something would call my attention to that, I would send a check in an amount large enough to cover and receive a rebate from the Treasurer, so sometimes my check was a larger amount than the receipt.

Q. Just state how much the treasurer received.

A. The treasurer received on July 16, 1906, $313.95, being tax for the year 1905. Then, on July 12, 1907—no, on July 17, 1907, he received $449.28. On this day he sent the bill on two of the lots separately, this payment being made on two bills, one for lots 1 to 7 and the other for lots 8 and 9, the former for $341.64 and the latter for $107.64. On May 28, 1908, I paid to the same County Treasurer $306.92, this latter being for the taxes of 1907, the payment just before testified to being for the year 1906. This payment of May 28, 1908, $306.92, was for the first half of the tax for the year 1907. The last half was paid on November 30, 1908, $306.86. I don't remember how it comes

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that there is that small difference, but the receipts read in the amounts I am stating. Then, on May 24, 1909, I paid $420.31 on account of the taxes for the year 1908, and then on November 26, 1909, I paid for the last half of year 1908, $124.02 and $296.27. On September 3, 1910, I paid taxes for the year 1909, amounting to $957.70, $922.02 being the face of the tax, and $35.68 being interest. On May 22, 1911, I paid the first half year of the taxes for 1910, being $389.34, and on December 12, 1911, for the last half year of 1910 I paid $420.47, $31.14 of that being for interest. On May 27, 1912, I paid the first half year's taxes for 1911, $354.08, and on November 30, 1912, Mr. Baker, as I have explained heretofore, while he was in or about Seattle, paid the last half year's taxes for 1911, $354.07. The receipt that I hold is dated November 30, 1912.

Q. Those receipts show full payment of the taxes on the dates you have mentioned on the entire block?

A. Yes. [152—63]

Q. And the payment was made by you in behalf of the company? A. Yes.

Q. And the receipt showing payment by Simpson covering the delinquency certificates came into your hands and have since been made part of the records of the company?

A. Yes. There are other payments. There is an annual rental payable to the State for the lease, No. 181, involved in this proceeding, that rental amounting to $37.96 a year. That has been paid for the year 1906. The rental period runs from January 26th of one year to January 26th of the next, and we have

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paid for all the years from January 26, 1906, to the present year. I don't know how it happens, but the last receipt for the payment made January 27, 1913, says, 'Lease from February 26, 1913, to February 26, 1914.' All the others run from January 26 to January 26. Then I have also paid a personal property tax. There seems to have been no personal assessment until quite recent years. The first one was paid January 23rd—the only one I have a record of here is January 23, 1912, $30.55. That was the personal property tax for the year 1910.

Q. On what property?

A. On the assessed valuation of the leasehold, as I understand it.

Q. That is, the leasehold of the harbor area?

A. Yes. This payment of $30.55 was $27.14 tax and $3.37 interest. Then on April 24, 1912, I paid $25.14, being the personal property tax for the year 1911. Then just lately I forwarded to Mr. Meacham, to pay the tax for the present year, $90.00. Just how much that tax will turn out to be, with the interest, I don't know. There is some interest. Then I have paid for the annual license fee and penalties—an annual license fee for the corporation since the year of its organization, $15.00 per year and penalties of $110—penalties and reinstatement fees. Then I have paid, as I testified this morning, $300.00.

Q. You did not give the date of the payment of that penalty.

A. These payments have been made from time to time. The date of the payment of the penalties was May 10, 1912. I have paid also for certificate book

(Deposition of Algernon S. Norton.)

and seal and organization expenses to Mr. Meacham, an amount that I am not just clear on now. I do not have receipts for those, and I do not find my checks for the amounts. I have them in an account-book, but I cannot at the moment state just how much, but I would say not to exceed $50.00 in the aggregate, and also from time to time charges for recording instruments and other small charges that I cannot at the moment give the exact amount of, and I have also paid by disbursements, or a part of my disbursements and my expenses on the trip that I took in the interests of the property of the company last summer, such amount being $300.00. The $300.00 was not the entire amount of my expenses. That was the amount I agreed upon with Mr. Baker should be charged to the company."

[Testimony of Ludwig Frank, for Plaintiff.]

That LUDWIG FRANK, U. S. Deputy Marshal, as witness for plaintiff, testified that he endeavored to serve subpoena for plaintiff on George F. Meacham and returned it "Not found," Meacham being supposed to be in New York or Chicago, not to return until March 1st. No subpoena was issued for Meacham by the defendants. [153—64]

[Testimony of John W. Schofield, for Plaintiff.]

JOHN W. SCHOFIELD was produced as a witness on behalf of the plaintiff and testified as follows:

That he is the plaintiff in this action. That he is connected at the present time with the office of the Comptroller of the Currency, being a national bank examiner, and in that capacity has served as receiver

(Testimony of John W. Schofield.)

in some fifteen or twenty national banks. He also stated that it is the practice in the Comptroller's Department not to discharge receivers of national banks for the reason that assets have been known to turn up. Then, too, the department did not desire to release bonds of receivers, but that it keeps the receivership alive. The witness further testified that he had not paid dividends in this trust.

On cross-examination the witness testified that it is the custom of the department in taking charge of an insolvent national bank to list all of the assets under three heads, to wit, "Good," "Doubtful," and "Worthless." That immediately after a bank fails all the assets are listed under one of these three heads, and that they remain in this classification even though the actual nature of the assets should be changed. For instance, he testified, anything that was listed under the head of "Good" would remain in that classification even though it became worthless, and *vice versa*.

On redirect examination the witness testified that there might be additional assets discovered, and if so such additional assets were classified under one of these three heads just mentioned. The witness further testified that as receiver of the Merchants' National Bank no funds had come into his hands, and that at the present time he is without funds, and that there are no assets of the bank so far as he knows excepting the claim which he is asserting in this action.

By consent of both parties to the suit, the ledger and journal kept by Receiver Baker, and subsequently by Receiver Frater, were referred to at will.

Some of the items were introduced by the plaintiff and some by the defendants. For completeness they are all embodied at this point in the record as follows: [154—65]

				213 (Journal)
1/12/97.	Loans. Paid and Other Disb.....		4742 76	4742 76
	Paid Commissioner of Public Lands for certain Tide Land Contracts: Nos. 427–8–9 and 430.		264 80	
	All of Block 429	$664 00 10%		
	" " " 430	1488 payment.		
	Lots 1–8 and 13–20 Block 432	472		
	Lots 13–18 Block 444	24		
		2648		
	Cash			264 80
1/13/97.	Sundries—			
	Loans. Paid and Other Disb.....		20	
	Paid on Receiver's C/D #551 favor Seattle Clearing House Assn.			
	Collection from Interest on Geo. Brackett note B/D #9564.			
	All Other Expenses.....		25	
	Office Rent for Jan.	V. 240		
	Legal Expenses Paid.....		68 30	
	Paid Murray & Christian % costs of witnesses and stenographer's work to appeal case—Sidney Sewer Pipe & Terra Cotta Works Co. Case			
	Witnesses.....38.30			
	Stenographers..30.	V. 241		
	Loans. Paid and Other Disb.....		25	
	Paid insurance from 11/3/96 to 11/3/97 (Hanford & Stewart) on 1000 00 policy on Hotel & Store at North Bend which we hold as security to Gustin & Tibbetts indebtedness—	V. 242.		
	Cash			138 30
			5145 86	5145 86

[155—66]

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			6879 90	6879 90
3/23/97.	Loans. Paid and Other Disb.....		2 41	
	Paid % Delinquent taxes on Lot 26 B. 21 Lake Ave. Add. to Kirkland. V. 267.			
	Cash			2 41
3/25/97.	Loans. Paid and Other Disb.....		9 55	
	Refunded 1894 tax on Witman Property at Anacortes .....11.55 V. 268.			
	less Costs.. 2.			
	Lot 9 Blk. 10 Queen Avenue Add. to Anacortes V. 268.			
	Cash			9 55
3/30/97.	Loans. Paid and Other Disb.....		228 75	
	Paid on Receiver's C/D #551 favor of Seattle Clearing House Assn.			
	Collection from collaterals:			
	Young Bros. note B/D #9560.			
	10/15/96 Prin.100. 2/15/97 Prin.100.			
	Int.. 8.75 Int.. 20.			
	Cash			228 75
3/31/97.	Loans. Paid and Other Disb.....		405 15	
	Paid Commissioner of Public Lands State of Wash. % Tide Land Contracts One Tenth of Purchase Price with interest, Second annual payment.			
	Contract #395 38.60 Prin.			
	14.57 Int.			
		53.17		
	" #396 36.30 Prin.			
	13.73 Int.			
		50.03		
	" #727 66.40 Prin.			
	4.78 Int.			
		71.18		
	" #728 148.80 Prin.			
	10.72 Int.			
	V. 269.	159.52		
	" #729 47.20 Prin.			
	3.51 Int.			
		50.71		
	" #730 2.40 Prin.			
	.19			
		2.59		
	" #866 16.70 Prin.			
	1.25 Int.			
		17.95		
	Cash			405 15
			7525 76	7525 76

[156—67]

330

		8228 73	8228 73
3/31/97	Additional Assets Good.....	761 55	
	Tide Land Contracts—		
	Nos. 395, 396, 727, 728, 729, 730, 866.		
	First payment on all was.....$356.40		
	Second " " " " 405.15		
	Due Stockholders.....		761 55
3/31/97	Cash	411 75	
	Bills Receivable Doubtful.....		411 75
	Cross Undertaking Co. note B/D #8974.		
	Monies collected by Ira Bronson Atty. in 1895 from Pendleton Estate claim & allowed by him toward his Compromise.		
3/31/97	Cash	795 50	
	Bills Receivable Doubtful.....		660
	Ira D. Bronson et al. B/D #9411.		
	Note sold to Ira Bronson attorney, and allowed by him in his Compromise.		
	Premium Interest Rent etc.....		135 50
	Int. Ira D. Bronson et al. note B/D #9411		
	See memo. above. Int. to 11/27/96 reckoned.		
3/31/97	Loans. Paid and Other Disb.....	1207 25	
	Payment of bill to Ira Bronson Attorney. settled by Compromise by order of the Comptroller. (Bronson had a lien on all assets in his hands.)		
	His original Claim was..1625.00 Fees		
	300. Salary		
	1925		
	Less cash from Pendleton Estate..... 411.75 $1513.25		
	Cash		1207 25
		11404 78	11404 78

[Endorsed]: Case No. 1—Equity. Plaintiff's Exhibit 21. United States District Court, Western Dist. of Washington. Schofield, Recr., vs. Baker et al. Filed Feb. 27, 1914. Frank L. Crosby, Clerk. By S. E. Leitch, Deputy.

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(Journal.)

1897				
Nov. 29	Offset allowed on Premium Int. Rent and Int. B/R good #9577—Sheafe et ux...		2 05	
	Liabilities Cancelled by offset or otherwise Individual deposit (Unclaimed balance) Anna J. Sheafe.			2 05
29	Cash	8000 00		
	Bills Receivable (good).....			8000 00
	B/R #9572 6000.00 and 9577 2000.00 C. M. Sheafe et ux—exchanged for Real Estate.			
29	Loans Paid & other disbursements.....	8000 00		
	Cash			8000 00
29	Additional Assets (doubtful).....	8000 00		
	Real Estate, Lots & blks. in Elliott Bay Addn. to West Seattle received from C. M. Sheafe et ux in exchange for B/R. #9572 & 9577.			
	Due Stockholders			8000 00
23	All other Expenses.....	144 05		
	Amt. of bill of W. L. Seeley Special Examiner for services rendered for examination and report upon the affairs of this trust from Aug. 6/97, to date. See letter of Compt. Dated Nov. 13/97.			
	Balance in hands of Comptroller.....			144 05
29	Cash	315 20		
	Additional Assets (good)—			
	Tide land Contracts #727, 116.40, #728, 196.80 sold to S. G. Simpson.....			315 20
		34350 45		34350 45

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13th Quarterly Report Commences Here.

1898					
July	7	Cash		200	
"	"	Assessments paid			200
		Abram Baker on ⅝ his 75% stockholders' Assessment as Per Contract			
"	13	Cash		15 50	
"	"	Additional assets Good			15 50
		This being interest which was omitted in the sale of tide land contracts No. 727 & 728 sold to Sol Simpson but neglected to included at the time of sale.			
"	13	Cash		10 00	
"	"	Bills Rec. Doubt			10 00
		Cross Undertaking Co. #8974 paid on ⅝ of Rich. Corkson by Minnie Corkson.			
"	13	Cash		100 00	
"	"	Bills Rec. Good			100 00
		Young Bros. #9560.			
"	13	Cash		13 44	
"	"	Bills Rec. Good			13 44
		Young Bros. #9560 Their 5% Div. C/E.			
"	13	Claims Bond		188 11	
		Rec. Certf. #554 Young Bros. Bal. to be Canceled.			
"	"	Individual Deposit			188 11
		Bal. Due on Certf. #554 Young Bros.			
[159—70]				329 05	329 05

306 1899					
April	15	Cash		3085 82	3085 82
				120 00	
"	"	Bills Rec. Doubt			120 00
		D. U. Gilman #9506 Being for sale of lots 19 & 20 Blk. 8 Gilmans Ad. to Seattle. See letter Comptroller authorizing this Sale to Mrs. Mary J. Little. A subsequent sale was made by Mrs. Little to a Wm. Stickney and deed was made direct to him by Receiver.			
"	15	Additional Assets Good		1000 00	
		All title right & interest in the lots contested for by the Receiver in Block 431, Seattle Tide Lands.			
"	"	Due Stockholders			1000 00
		Additional Assets as Above sold to W. D. Hofius & Co. See letter Comptroller.			
"	"	Cash		1000 00	
"	"	Additional Assets Good			1000 00
		Lots in block 431 as above sold to W. D. Hofius & Co.			
"	"	Cash		2000 00	
"	"	Additional Assets Good			2000 00
		Sale of Seattle Tide Land Contracts Numbers 729, 730, 396, 866 & 395 to W. D. Hofius & Co. See letter Comptroller.			
				7145 82	7145 82

[160—71]

				307
1899			7145 82	7145 82
April 15	Legal expenses paid.....		50 00	
	J. H. Barnes Atty. for proceedings to Collect judgment of Gustin et al. vs. Jose et al. Cash (in draw) was advanced to him for this purpose Feby. 21st/99. See receipt, Receipt file.			
" "	Cash			50 00
" 15	Bal. in hands Compt.....		3600 00	
	New York draft to E. U. Roberts Treas. U. S.			
	Remittance Compt.			
" "	Cash			3600 00
			10795 82	10795 82
June 4	Additional Assets Good.....		1644 15	
	Blocks 395-396-431-866 and 730 Tide Land Contracts			
	Due Stockholders			1644 15
	Gain on Tide Land Contracts.			
	To Correct Error made by Rec. Baker April 15, 1899.			
	See Letter Comptroller May 23, 1899. [161—72]			

642 Good

Additional Assets coming into possession of the Receiver.

6/13/95	Monies collected for Puget Sound N/Bk. Evers awaiting adjustment of their account	79 50	6/13/95				79	50
"	Same for National Park Bk. N. Y....	105 70	"				105	70
"	Do.	29 87	"				29	87
"	Do.	50 85	"				50	85
"	Do.	19 53	"				19	53
7/3/95	Do.	30	7/3/95				30	
"	Monies collected for Ladd & Tilton % Outstanding Drafts	565 20	"				565	20
7/1/95	C. N. Sheafe note...	189 60	7/1/95				189	60
7/6/95	W. R. Thornell note.	725	7/6/95				725	
7/6/95	Do.	100	"				100	
7/10/95	Credit with First N/Bk. Chicago % Drafts	1212 42	7/10/95				1212	42
"	Credit with Wells Fargo S. F. % Drafts	2253 34	"				2253	34
"	Credit with Nat'l. Park Bk. N. Y. % Drafts	5678 78	"				5678	78
"	C. C. Evers note....	15	7/21/95				15	
								10
"	A. G. Lincoln note..	111 35	6-29-01	Cash Loss		352	111	25
"	W. L. Russell note..	1338	6-29-01	Cash Loss		352	1245	00
							8	
			12/22-99				85	
			6-29-01	Cash Loss	Cash 7-15		5	10
							904	31
			6-4-01				50	
"	Sidney Sewer Pipe Co. Note	1083 01	3/21/97				30	—
			3/13/99				30	
			4/11-99				18	
			7/21-99				39	60
			11/11 "				12	
							18	00
							1	00
"	R. Schmidt et al. Note	1000	6-29-01	Cash Loss		351	999	
"	4 1/16 Shares Seattle Transfer Co. stock	406 25	6-31-99			312	284	57
			12/25-98	Loss Compromised			121	88
"	75 shares Wenatchee Development Co. stock	7500	6-10-01	Cash Compromise		340	750 6750	
		22493 39						

[162—73]

								643
		22493	39					
10/14/95	First Natl. Bank of Chicago Credit % Coll. Fry.....	150		10/14/95	Offset Credit First N/Bk. of Chicago.		150	
12/21/95	Credit with Puget Sound N/Bk. of Everett % Coll.....	15	53	5/18/96			15	53
12/31/95	Fictitious Credit with National Park Bank N. Y. Allowed in their settlement.....	7009		12/31/95			7000	10
1/16/96	Laramie Mayer note.....	100		6-29-01	Cash Loss	352	99	90
3/9/96	Crawford Howell Judgment Costs	80		3/9/96			80	
3/16/96	Back interest owed by R. A. Lanier	10		3/16/96			10	
3/16/96	Assessment West Seattle E. L. Property	3010	92	6-29-01	Loss	355	3010	92
3/24/96	Puget Sound N/Bk of Everett Receivers C/D	170	58	5/18/96			170	58
								50
				6-29-01	Cash Loss	352	765	28
				2/5/97			25	
2/3/96	Seattle Amusement Co. Note..	874	78	3/12/97			25	
				6/29/97			9	
				6/1/99			50	00
2/25/96	Peninsula Rwy. Co. Bond.....	1733		4/24/97			1733	
2/25/96	Peninsula Rwy. Co. Interest Coupons	1860		6-29-01	Loss	355		21
1/4/96	Cash from Natl. Park to pay 10th assessment on Peninsula Rwy. Co. Bonds deposited with them as collateral for which claim had been made.	280		1/4/96			280	
3/31/96	L. K. Church old recording fees owed bank before suspension	2	75	3/31/96			2	75
5/19/96	Credit with National Park Bank % Rebate Interest J. 181	50	63	5/19/96			50	63
10/7/96	Monies advanced for Wells Fargo & Co. Bk. to protect collaterals	2000		10/7/96			2000	
10/7/96	Assessment paid 9/8/96 on W. S. Land Impr. Co. Stock for E. L. & Co.....	3013	15	6-29-01	Loss	355	3013	15
11/16/96	Legal Costs paid on Jos. Campbell notes 5/20/96.....	5		11/16/96			5	
3/25/97	Interest Mary M. Miller Stock Assessment	112	05	3/25/97			112	05
								50
3/31/97	Monies owed by J. F. Eshelman & Wm. H. Llewellyn...	141	42	6-29-01	Cash Loss	352	140	92
3/31/97	Tide Land Contracts Nos. 395, 396, 727, 728, 729, 730, 866.	761	55	11/29/97	#727 & 728..$315 20			
				7/13-98	.....15 50			
		43864	75	4/15	.....2000 00			
					2330 70			
12/31/95	See entry page 122 Journal—The first item listed under Add. Asssmts. Good see p. 642 Ledger was less..... taken out of this account by counter entry.	79	50					
		43785	25					

The defendants offered in evidence a certified copy of Schedule E of the receiver's report for the quarter ending November, 1897, and the same was received in evidence and marked Defendants' Exhibit "E," and read as follows:

Defendants' Exhibit "E" [Certified Copy of Schedule E of Receiver's Report for Quarter Ending November, 1897].

SCHEDULE E.

TREASURY DEPARTMENT.

Office of the Comptroller of the Currency.

Quarter Ending November, 1897.

COLLECTIONS OF OTHER ASSETS, Acquired Since Suspension, by the Receiver of the Merchants' *Fractional* National Bank of Seattle:

Date.	Description of Assets.	Good.	Doubtful.	Worthless.
1897.	Amount at date of last report....	22548.82	8354.35	
	Sold to S. G. Simpson Tide Land Contracts #727 & 728.....	315.20		
		22864.02	8354.35	

The defendants offered in evidence a certified copy of a letter dated March 22, 1899, from Baker, receiver, to Dawes, Comptroller, and the answer thereto, the same being admitted in evidence and marked Defendants' Exhibit "F," and read as follows: [164—75]

Defendants' Exhibit "F" [Letter, Dated March 22, 1899, Chas. H. Baker to Comptroller of Currency].

No. 2985.

THE MERCHANTS' NATIONAL BANK.
CHAS. H. BAKER,
Receiver.

Office Comptroller
Mar. 27. 1899,
of Currency.

Seattle, Wash., March 22nd, 1899.

Hon. Chas. G. Dawes,
Comptroller of Currency,
Washington, D. C.

Answered
Mar. 27, 1899.
Insol. Bks.

Dear Sir:

Under a statute of the State the owner of upland real estate is entitled to purchase from the State under a ten year contract certain contiguous tide land such as may be *a*lotted by the state tide land commission. Under this right of upland ownership the trust has made contracts for the purchase of certain tide lands abutting at West Seattle and has made certain payments thereon with the exception of block 431, which has been in contest with other claimants. I have sold, subject to your approval, the trust's interest in block 431 for $1000 cash. No payments of course have been made to the state as no contract for this has been issued. This is therefore an additional asset and when your Mr. Wing was here no value was set upon it. The other contracts I have sold subject to your approval for $2000 cash.

Certain payments have been made on them here below set forth, so you will observe that the trust makes a good profit on this transaction. I have not held these properties at any higher figure than the trust's payments upon them, but there has been for several days some speculative interest in the property in question and there were three parties after it all about the same time. I do not know what the basis of the speculation is, but I submit these offers as the best that I could do, which I think highly satisfactory to the interests of the trust. The three contracts proposed to sell additional to the one hereinabove set forth are as follows:

Block 432, paid thereon..	$234.76	4 annual payments
Block 441, paid thereon..	203.77	" " "
Block 442, paid thereon..	191.63	" " "
Total.....	630.16	

Sale price, $2000.

Net profit to the trust, $1369.84.

$1000 has been paid in escrow by W. D. Hofius & Co., with whom the transaction is made.

Yours respectfully,

CHAS. H. BAKER,
Receiver.

The above list should include the following also:

Block 443 paid thereon.....	76.05
" 444 " "	11.89
	87.94

Defendants' Exhibit "F"—Continued [Letter Dated March 28, 1899, Comptroller of Currency to Chas. H. Baker].

B. F. B.

Address Reply to
Comptroller of the Currency,
Washington, D. C.

TREASURY DEPARTMENT,
Office of the Comptroller of the Currency,
Washington, D. C., March 28, 1899.

Mr. Chas. H. Baker,
Receiver, Merchants' Nat. Bank,
Seattle, Wash.

Sir: I am in receipt of your letter of the 22nd instant, in which you state that under the Statutes of the State of Washington, the owner of upland real estate is entitled to purchase from the State under a ten year contract certain contiguous tide land such as may be allotted by the State Tide Land Commission; that under this right of upland ownership the trust has made contracts for the purchase of certain tide lands abutting at West Seattle and has made certain payments thereon with the exception of block 431, which has been in contest with other claimants, and that no payments have made to the State as no contract for this land has been issued, and therefore, it is an additional asset upon which you have previously placed no value. You state that you have sold the other contracts, subject to the approval of the Comptroller, for $2,000 cash, and that certain payments have been made upon

them as shown in your letter. It is noted that these offers are the best you could obtain, and you regard them as 'highly satisfactory to the interests of the trust.' The three contracts proposed to be sold in addition to No. 431 are stated by you as follows:

Block 432,	paid thereon	$234.76	4	annual payments.
" 441,	"	203.77	4	"
" 442,	"	191.63	4	"
	Total,	$630.16		

Baker, page 2.

Sale price $2,000, giving a net profit to the trust of $1,369.84; and further that $1,000 has been paid in escrow by W. D. Hofius & Co. with whom the transaction was made. You further state that the above should include the following:

Block 443, paid thereon	$76.05
Block 444, paid thereon	11.89
	$87.94

The transaction as presented by you appears to be for the interests of the trust, and if you and the representative interests of your trust are satisfied that this is for the best interests of the creditors, and the best proposition you can obtain, you are authorized to petition the court for an order to sell upon the terms stated in your letter of the 22nd instant.

Very respectfully,

CHARLES G. DAWES,

Comptroller. [166—77]

The defendants offered in evidence a certified copy of a letter dated March 13, 1899, from Baker, receiver, to Dawes, comptroller, the same being ad-

mitted in evidence and marked Defendants' Exhibit "H," and reads as follows:

Defendants' Exhibit "H" [Letter, Dated March 13, 1899, Chas. H. Baker to Comptroller of Currency].

No. 2985.

THE MERCHANTS' NATIONAL BANK.
CHAS. H. BAKER,
Receiver.

Seattle, Wash., March 13, 1899.

Hon. Charles G. Dawes,
Comptroller of the Currency,
Washington, D. C.

Dear Sir:

I respectfully call your attention to your recent decision whereby a note signed by me, prior to the suspension of the bank, now becomes an asset of the trust. This places me in the embarrassing situation of debtor to my own Trust; and coming as it does under your decision it would seem that any right of off set or defense I may have had will no longer hold. I am further in the unfortunate situation of having no money or property or any means with which to effect a payment or compromise, which is made more embarrassing by the fact that there are several notes of similar magnitude in other banks, signed by myself.

My relationship to the Trust is inconsistent, therefore, and for that reason I tender you my resignation as Receiver.

The proper administration of the Trust, at the present time, should receive all the Receiver's time

and attention in order to do it justice, and this I am unable to give. I believe it impossible to continue the operation of the Trust under the reduced appropriation; which is a further reason why my trust should be vacated, I therefore offer you my resignation, subject to your early convenience and pleasure.

I would state in this connection that Mr. J. B. Hill has been my assistant and is familiar with the diversified interests and items of the Trust in a way that would take a new man several months to become acquainted with, and he would be entirely worthy your consideration as a successor.

I could not have kept him recently, except for his personal regard for me, as the compensation is not adequate for a gentleman of his attainments, and the fact that outside opportunities are becoming very prevalent, however, with the increased compensation which a Receiver would get he would be willing and able to devote all his time to your Trust in a loyal, energetic and efficient manner.

I desire to thank you personally for the uniform courtesy and consideration you have extended to me, and to assure you that from my own stand point the official [167—78] relationship has been as pleasant as possible, and I will consider that I am under obligations to you so that you may at all time that you so desire, command me.

Very respectfully,
(Signed) CHAS. H. BAKER,
Rec'v'r.

Mr. Hill informs me that he was a candidate for Receiver of Columbia Nat'l Bank of Tacoma, and he respectfully refers to his testimonials filed

in your department in Oct., Nov. and Dec. 1896. [168—79]

The defendants offered in evidence a certified copy of Schedule E of the receiver's report for the quarter ending April 15, 1899, and the same was received in evidence and marked Defendants' Exhibit "I," and reads as follows:

Defendants' Exhibit "I" [Certified Copy of Schedule E of Receiver's Report for Quarter Ending April 15, 1899].

SCHEDULE E.

TREASURY DEPARTMENT,

Office of the Comptroller of the Currency.

Quarter Ending April 15th, 1899.

COLLECTIONS OF OTHER ASSETS, Acquired Since Suspension, by the Receiver of Merchants' National Bank of Seattle.

Date.	Description of Assets.	Good.	Doubtful.	Worthless.
3/31, 1899.	Amount at date of last report..	24097 76	22077 34	29 08
4/11, 1899.	Sidney Sewer Pipe & Terra Cotta Co.'s Note #8681.....	39 60		
" 15th, "	Seattle Tide Lands.....	1000 00		
" " "	Seattle Tide Land Contracts...	2000 00		
		27137 36	22077 34	29 08

Approved

A. W. FRATER, Rec.

The defendant offered in evidence a letter dated December 1, 1897, from Baker, receiver, to James H. Eckels, Comptroller of the Currency, and the same was received in evidence and marked Defendants' Exhibit "J," and reads as follows: [169—80]

Defendants' Exhibit "J" [Letter Dated December 1, 1897, Chas. H. Baker to Comptroller of Currency].

No. 2985.

THE MERCHANTS' NATIONAL BANK.
CHAS. H. BAKER,
Receiver.

Office Comptroller,
Dec. 9, 1897,
of Currency.

Seattle, Wash., Dec. 1st, '97.

Hon. James H. Eckels,
Comptroller of Currency,
Washington.

Dear Sir:

I have the honor to submit herewith my report of the condition of this trust for the quarter ending Nov. 30.

I wired you about two weeks ago that I would be able to remit $2000, which I did upon the assurance that some more of the Peninsula Ry bonds would be taken but I have been disappointed. I think however this matter will soon be completed and also several large offset transactions.

Very respectfully,
CHAS. H. BAKER,
Receiver.

The attention of the Court was then called to the last entry made in the books of the receiver to the effect that it was of a different handwriting—the witness Frater having testified that this entry was made by his bookkeeper.

[Statement Re Introduction of Defendants' Exhibit "R"—Certified Copy of Award by State of Washington to Merchants' National Bank of Blocks 429 and 430, etc.]

The defendants then offered in evidence a certified copy of an award by the State of Washington to the Merchants' National Bank of blocks 429 and 430, the same having been made upon the application of the said national bank and before the receivership, and the same was admitted in evidence and marked Defendants' Exhibit "R." [170—81]

The defendants then offered in evidence a copy of receipts issued by the Commissioner of Public Lands showing the following facts (Received and marked Defendants' Exhibit "S"):

[Defendants' Exhibit "S"—Copy of Receipts Issued by Commissioner of Public Lands, etc.]

On April 27, 1899, S. G. Simpson paid the Commissioner of Public Lands $27.86 on account of interest on contract #727, and $62.51 on account of interest on contract #728.

On March 21, 1898, S. G. Simpson paid through his attorney Thomas H. Littell the annual installment of the principal together with the interest upon contracts #727 and #728.

On September 13, 1900, S. G. Simpson paid the Commissioner of Public Lands the interest on tide-land contract #728 amounting to $64.39.

On September 16, 1901, S. G. Simpson paid the Commissioner of Public Lands on account of interest on tide-land contract #728 the sum of $62.50.

On August 2, 1902, S. G. Simpson paid to the Commissioner of Public Lands on account of tide-land contract #728 interest amounting to $62.50.

On September 8, 1903, S. G. Simpson paid the Commissioner of Public Lands on account of tide-land contract #728 interest amounting to $60.62.

On March 1, 1904, S. G. Simpson paid the Commissioner of Public Lands on account of contract #728 interest amounting to $59.44.

The defendants then offered in evidence a certified copy of tide-land contracts covering—

Lots 1 to 6 and 11 to 17, inclusive, in Block 441.

Lots 1 to 6 and 11 to 17, inclusive, in Block 442.

Lots 1 to 8 and 13 to 20, inclusive, in block 432.

Lots 13 to 18, inclusive, in block 444.

Lots 3 to 6 and 9 to 11, inclusive, in block 443.

These contracts are identical in form with that covering block 430 except as to the appraised valuation.

These contracts were assigned by Baker, receiver, to W. D. Hofius and William Pigott on April 14, 1899, and approved by the Commissioner of Public Lands for the State of [171—82] Washington on December 14, 1899.

The foregoing tide-land contracts and the assignments thereof were received in evidence and marked Defendants' Exhibit "T."

The defendants then offered in evidence a certified copy of a deed from Sol. G. Simpson and wife under date of March 11, 1903, to the Seattle and San Francisco Railway and Navigation Company conveying, for a consideration of $1211.20, a right of way 30 feet in width across block 430, and the same was received

in evidence and marked Defendants' Exhibit "U."

The defendants then offered in evidence a certified copy of a deed from A. S. Norton and May L. Norton, his wife, under date of April 25, 1907, conveying block 430 to the Seattle Water Realty Company, and the same was received in evidence and marked Defendants' Exhibit "V."

The defendants then offered in evidence a certified copy of a contract made between the State of Washington and Eugene Semple, the same bearing date October 17, 1893, with a supplemental contract dated October 24, 1894, and the same was received in evidence and marked Defendants' Exhibit "W." This contract is what is commonly known as the "filling contract," made pursuant to an act of the legislature of the State of Washington, approved March 9, 1893, entitled, "An act prescribing the way in which waterways for the uses of navigation may be excavated by private contract, providing for liens upon the tide and shore lands belonging to the State, [172—83] granting rights of way across lands belonging to the State." The tide lands mentioned in the various contracts held by receiver Baker were within the district covered by the Semple contract. For the dredging of these waterways and the filling of these tide-land lots a lien was created upon the property. Block 430 has been filled under this contract, the fill having been completed in the summer of 1913. The total expense of filling, for which certificates have been issued, aggregates $79,352.76.

The defendants then offered in evidence a certified copy of the findings of fact and conclusions of law and decree in cause #57,534 in the Superior Court

of King County, State of Washington, being the case of Gladys F. Baker vs. Charles H. Baker, and the same was received in evidence and marked Defendants' Exhibit "X." These findings of fact and conclusions of law and decree were entered on September 6, 1907,—the case being one in which A. W. Frater was the presiding judge. The findings recited that, after evidence was introduced, the case was submitted to the Court, and, among other things, the Court found that a written agreement was made between the parties in full settlement and adjustment of all their property rights. The decree recites:

> "And it is further ordered, considered, adjudged and decreed that the disposition of the property of the parties to this action, which they have made between themselves, appears to the Court to be and is just and equitable having regard to the respective merits of the parties and to the condition in which they will be left by such decree, and the party through whom the property was acquired and the burdens imposed upon it for the benefit of the children of said parties, and such disposition of said property, together with the settlement and adjustment of the property rights of the parties is hereby approved and confirmed." [173—84]

The defendants then offered in evidence a copy of the agreement referred to in these findings, the agreement specifying that among other properties referred to were 250 shares of the capital stock of the Seattle Water Front Realty Company of the par value of $25,000, represented by certificate #34.

This agreement was received in evidence and marked Defendants' Exhibit "A–3."

[Testimony of Herbert S. Upper, for Defendants.]

HERBERT S. UPPER was then produced as a witness on behalf of the defendants and testified that he had resided in Seattle for 25 years, and had been in the real estate business during this entire time. That he was familiar with tide-land values in the city of Seattle. The witness further testified that he was familiar with the tide-land situation in the city of Seattle and vicinity in the years preceding the boom in tide lands which came when the railroads were particularly active in securing terminal facilities. The witness testified that block 430 was about one mile from Pioneer Square. That prior to 1900, the witness stated, he did not know of any tide lands selling west of the West Waterway. That block 430 was way out in the water. That north of this block and around the West Seattle Ferry there were some sales made. The witness testified that the only tide lands in the Seattle Harbor that were filled prior to 1900 were those within about four blocks of the Union Depot situated at Jackson Street and 3d Avenue South. That there were no fills west of 1st Avenue. The witness testified that prior to 1900 tide-land activity was principally along 1st Avenue. That there were some sales south of Spokane Avenue, [174—85] and that Spokane Avenue was fully half a mile south of block 430.

The witness further stated that in 1897 block 430 did not have very much value, and, upon being ques-

(Testimony of Herbert S. Upper.)

tioned as to what he meant by this, he stated that values in that section had not been established. That there had been very little business or demand. That the same condition prevailed in 1899. That these conditions changed principally after the railroad excitement in 1905 or 1906.

On cross-examination the witness testified that he had had a good deal of business in timber lands. That in 1902 he had personally bought lots in blocks 320 and 321. That these were the first lots he was able to readily sell. The witness did not remember whether he had made any purchases prior to this time. That he had other transactions in tide lands in 1902 or 1903. That there were certain lots on 1st Avenue South that he had likewise sold at an earlier date but could not recall just what these were. The witness did not recall any sales having been made west of the West Waterway from 1897 to 1901.

Upon redirect examination the witness testified that if there had been any sales in that vicinity he would have known in a general way of them, and that he did not recall any sales prior to 1900 west of the East Waterway.

[Testimony of George F. Dearborn, for Defendants.]

GEORGE F. DEARBORN was produced as a witness on behalf of the defendants and testified that he had lived in Seattle and been in the real estate business since 1896—that he had made a specialty of tide lands. The witnes testified that in 1897, '98 and '99 he did not know of any sales of tide lands [175—86] west of the West Waterway. That his

(Testimony of George F. Dearborn.)

firm dealt principally in tide lands nearer the city, and that in 1897 and '98 by advertising extensively they were able to get rid of a very little tide-land property. That their property in which they sold these lots was on 1st Avenue South in block 329. The witness stated that he did not think there was any market for anything located south of Atlantic Street or west of the East Waterway.

On cross-examination counsel for the plaintiff asked the witness if about 4/5ths of the tide lands in the Seattle Harbor were covered with water in 1899, and the witness stated that a good deal of tide lands were. The witness stated that there might have been sales in that district without his knowledge. The witness stated that while he did not pretend to say that property was not selling in that vicinity in 1899, yet, if there had been any considerable sales of tide lands in that vicinity, by reason of their system of keeping account of property sales he thought they would have known about any sales. That what he meant to state was that their particular interests were east of the West Waterway on account of their shore-land ownership.

The witness stated upon further cross-examination that in 1898 and 1899 that the sales were made upon the contracts from the State—the contracts being delivered and the purchasers assuming the balance of the purchase price.

[Testimony of Joseph B. Hill, for Defendants.]

JOSEPH B. HILL, being produced as a witness on behalf of the defendants, testified as follows:

That he had resided in Seattle for 23 years, and had been acquainted with the defendant Charles H. Baker during the [176—87] entire time. That he became connected with the receivership of the Merchants' National Bank in March or April, 1897, as bookkeeper, having succeeded Harry Meserve in that position. That he was the only bookkeeper the receiver had. That he had entire charge of the books and accounts of the receivership. That after he became connected with the receivership, Mr. Baker took on some outside business, being connected with the Snoqualmie Falls Power Company. This was in the fall of 1897. That after the latter part of 1898 Mr. Baker devoted considerable time to the power company.

Q. Mr. Hill, when you became accountant and bookkeeper for this receivership, did you go over the assets that were in the hands of the receiver?

A. I did.

Q. Among those assets the evidence shows there was considerable tide lands?

A. There was, yes, sir.

Q. Do you recall the tide land that belonged to that trust west of the Seattle Waterway, known generally as embraced in the application that had been made to the State for the purchase of those West Seattle tide lands?

A. I think they were all west of the Seattle Waterway.

(Testimony of Joseph B. Hill.)

Q. Do you recall about how many blocks there were of that tide land?

A. I really cannot, because I always had a printed slip of paper.

Q. Can you refresh your recollection by any document which was used?

(Handing document to witness.)

A. Yes, sir. This was the slip that was gotten out by Mr. Baker, the receiver. This is correct. This is the memorandum gotten up by the receiver.

The paper writing was admitted in evidence and marked Defendants' Exhibit "A-2," and the following is a photograph of said exhibit. [177—88]

[Defendants' Exhibit "A-2."]

REAL ESTATE
Belonging to the
MERCHANTS' NATIONAL BANK
of Seattle, Wash.
For Sale by
CHAS. H. BAKER, RECEIVER,
507 Pioneer Building.

To Creditors of the Merchants' National Bank:

In view of the great difficulty and necessary sacrifice in converting to cash the real estate and other assets of this trust, I have been authorized by the Comptroller to effect exchanges of such assets for outstanding Receiver's certificates with such holders as may be desirous of doing so upon a satisfactory basis.

CHAS. H. BAKER,
Receiver, Seattle, Wash.

[Endorsed]: 1—Equity. Case No. ——. Defendants' Exhibit A-2. United States District Court, Western Dist. of Washington. Schofield, Rec., vs. Baker et al. Filed Feb. 27, 1914. Frank L. Crosby, Clerk. By S. E. Leitet, Deputy. [178—89]

REAL ESTATE BELONGING TO THE MERCHANTS' NATIONAL BANK.

SEATTLE.

Salmon Bay Park Addition.

All of Block 12.

B. F. Day's First Addition.

Block 3, Lots 1 and 2.

Wallingford's Div. of Green Lake Ad.

Block 9, Lots 2, 3, 4, 5, 6, 7 and 8.

Dearborn's Cable Line Addition.

Block 1, Lots 3 and 4.

Palatine Hill Addition.

Block 2, Lots 11, 12, 13, 14, 15, 16 and 19.

Block 3, Lot 18.

Block 4, Lots 11, 12, 13, 14 and 15.

Block 5, Lots 2, 13 and 14.

Block 6, Lots 10, 11, 12, 13, 14, 15 and 16.

Block 7, Lots 5, 6, 10, 11 and 15.

Block 9, Lots 1, 2, 3, 8, 9, 10, 11, 12, 13 and 14.

Block 11, Lots 2, 6, 7, 11, 12, 13, 14, 15 and 20.

Block 12, Lots 1, 2, 3, 4, 5, 6, 7 and 8.

Block 13, Lots 8 and 9.

A. A. Denny's Addition.

Block 47, Lots 10 and 11.

Terry's Second Addition.

Block 91, Lot 5.

Burke's Second Addition.

Block 30, Lots 3, 4, 5 and 6.

Gilman's Addition (First Subdivision).

Block 1, Lots 9, 10, 11 and 12.

Block 2, Lots 5, 6, 7 and 8.

Block 3, Lots 1, 2, 3, 18 and 19.

Block 4, Lots 5, 6, 7, 8, 21, 22, 23 and 24.

Block 5, Lots 1 and 2.

Block 7, Lots 5, 6, 7, 8, 21, 22, 23 and 24.

Block 8, Lots 1, 2, 3, 4, 5, 17, 18, 19 and 20.

Block 9, Lots 12, 16, 17, 18 and 19.

Hunter's Lake Union Addition.

Block 3, Lots 5 and 6.

Block 8, Lots 4, 5, 6, 7 and 8.

A. A. Denny's Sixth Addition.

Block 40, Lot 6.

Wassom's Ad. to Ravenna Park Ad.

Block 3, Lots 11, 12, 13, 14, 15, 44, 45, 46, 47 and 48.

Wood's South Shore Div. of Green Lake Addition.

Block 45, Lots 1, 2, 3, 4 and 5.

Block 24, Lots 5, 6 and 7.

Block 25, Lot 1.

Day's La Grande Addition.

Block 9, Lots 11 and 12.

Block 8, Lots 17, 18, 19 and 20.

Central Seattle.

Block 14, Lots 9, 11 and 12.

Woodland Park Addition.

Block 64, Lots 2, 3 and 4.

Lake Union Second Addition.

Block 13, Lots 1, 2 and 4.

Rainier Addition.

Block 2, Lots 6 and 7.

Block 3, Lots 1 and 2.
Block 5, Lots 5 and 6.
Block 6, Lots 6 and 7.
Block 7, Lots 5, 6, 7, 8, 9 and 10.
McKenzie & Dempsey Lake Washington Addition.
Block 2, Lots 5, 6, 7 and 8.
Steel Works Addition.
Block 6, Lots 12, 13 and 14.
Block 14, Lots 1, 2, 3, 4 and 5.
"Lindenau" Addition.
All of Blocks 1, 2 and 3.
Block 4, Lots 1, 2, 3, 4, 5 and 6.
Denny & Hoyt's Addition.
Block 4, Lots 10 and 11.
Block 6, Lots 13 and 14.
Block 8, Lots 21 and 23.
Block 12, Lot 13.
Block 13, Lot 14.
Block 15, Lots 1, 2 and 11.
Block 16, Lots 1, 2, 13 and 14.
Block 20, Lots 14 and 15.
Block 24, Lot 14.
Block 35, Lots 3 and 13.
Block 38, Lots 1 and 2.
Block 41, Lots 1 and 2.
Block 43, Lots 1, 2, 3, 4, 7, 15, 16, 17 and 18.
Block 46, Lots 1, 2, 19 and 20.
Block 48, Lot 25.
Block 51, Lots 22, 23, 24 and 25.
East Seattle.
Block 10, except Lots 11, 12, 25 and 26.
Block 17, Lots 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16.

Township 23 North, Range 4 East, W. M., SE¼ of SE¼ of SE¼ of Sec. 17.

E½ of SW¼ of SE¼ of Sec. 2.

N½ of NE¼ of SE¼ of Sec. 17.

Gilman Park First Addition.

Block 6, Lots 1, 2, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 47 and 48.

Block 7, Lots 33, 34, 35, 36, 40, 41, 42, 43, 44, 45, 46, 47 and 48.

Block 8, Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 45, 46, 47 and 48.

Block 9, Lots 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 39, 40, 41, 42, 43, 44 and 45. [179—90]

REAL ESTATE BELONGING TO THE MERCHANTS' NATIONAL BANK.

SEATTLE—Continued.

Maple Leaf Addition.

Tract 15, Acre 4, and Lots 1, 2, 3, 4 and 5 in Acre 3. All of Tract "C."

Tract 35, Acres 2 and 3.

Tract 31, Lots 2, 3 and 4 in Acre 1, and Lot 3 in Acre 5.

Tract 36, Lots 1, 2 and 3 in Acre 1, and Acres 2, 3, 4 and 5.

Tract 52, Lots 1, 2 and 3 in Acre 1, and Lots 1, 2 and 3 in Acre 2; Lots 1, 2 and 3 in Acre 3; Lots 1, 2 and 3 in Acre 4; Lots 1, 2 and 3 in Acre 5.

Tract 98, Lots 1, 2 and 3 in Acre 1; Lot 4 in Acre 5.

Tract 106, Lots 3 and 4 in Acre 1; Lots 2, 3, 4, 5 and 6 in Acre 2; all of Acre 3, and Lots 1, 2, 5

and 6 in Acre 4; Lots 3 and 4 in Acre 5.

All of Tract 111.

Monroe's Subdivision of Blocks 104 and 105, Maple Leaf Addition.

All of Blocks 1 and 2 and Lots 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25 in Block 3; Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 in Block 4.

Randell's Addition.

Block 5, Lots 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 31.

Block 6, Lots 4, 5 and 6.

Block 7, Lots 1, 2 and 3.

Block 8, Lots 5, 6, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 and 32.

Block 9, Lots 1, 2, 3 and 4.

Block 18, Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12.

WEST SEATTLE.

Banner Tract.

Block 4, Lots 24, 25 and 26.

Water-front and Tide Land.

A portion of Lot 2 of Sec. 12, Township 24 North, Range 3 East W. M., containing between 5 and 6 acres.

10.08 acres in Sec. 12, Township 24 North, Range 3 East.

Lots 78, 79 and 80, West Seattle 5-acre tracts, excepting the following parts thereof: Lots 19 to 22 inclusive, Block 1; Lots 2, 12, 13, 14, 15, 16, 17, 22, 23, 24 and 25, Block 2; Lots 10 to 13 and 16 to 26, Block 3; Lots 1 to 19 and Lots 21, 22, 25, 26, 27, 28, 29, 31 and 32, Block 4; and Lots 1,

2, 3 and Lots 17 to 30, Block 5, all in Elliott Bay Addition to West Seattle.

East Side Lake Washington.

Township 25 North, Range 2 East, N½ of NW¼ of Sec. 35, containing 80 acres.

A tract of land of uniform width off the north side of Lot 2 in Sec. 30, according to Government survey, and containing five acres.

Green Lake Circle.

Five-acre Tracts "C," "F," "K" and "H" and Nos. 45, 52, 61, 62, 81, 104, 105, 106 and 111.

Tract 36, excepting Lots 4, 5 and 6 in Acre 1.

Tract 2, Acre 5.

Tract 16, Acres 1 and 4, and Lots 3, 4, 5 and 6 in Acre 2.

Tract 31, Acre 5, and Lots 2, 3, 4, 5 and 6 in Acre 1.

Tract 35, Acres 2 and 3, and Lots 1, 2, 3, 4 and 5 in Acre 1.

Tract 98, Acre 5, and Lots 1, 2 and 3 in Acre 1.

Tract 97, and Lots 3 and 4 in Acre 2.

Tract 15, Acres 2, 3 and 4, and Lots 2, 3 and 4 in Acre 1.

Seattle Tide Lands.

All of Lots 1 to 6 and 11 to 17 inclusive, Block 442, as shown on Page 51, Vol. 2, Map of Seattle Tide Lands, filed in the office of the Board of State Land Commissioners at Olympia, Wash., on the 15th day of March, 1895.

All of Lots 1 to 6 and 11 to 17 inclusive, Block 441, as shown on Page 51, Vol. 2, Map of Seattle Tide Lands, filed in the office of the Board of State Land Commissioners at Olympia, Wash., on the

15th day of March, 1895.

All of Lots 3, 4, 5, 6, 9, 10 and 11, Block 443, as shown on Page 52 of the Map of Seattle Tide Lands, filed with the Board of State Land Commissioners at Olympia, Wash., on the 15th day of March, 1895.

All of Block 429, according to survey thereof, as shown on the Map of Seattle Tide Lands, filed in the office of the Board of State Land Commissioners at Olympia, Wash., on the 15th day of March, 1895.

All of Lots 1, 2, 3, 4, 5, 6, 7, 8, 13, 14, 15, 16, 17, 18, 19 and 20, Block 432, according to survey thereof, as shown on the Map of Seattle Tide Lands, filed in the office of the Board of State Land Commissioners at Olympia, Wash., on the 15th day of March, 1895.

All of Lots 13 to 18 inclusive, Block 444, according to the survey thereof, as shown on Page 53, Vol. 2 of the Map of Seattle Tide Lands, filed in the office of the Board of State Land Commissioners at Olympia, Wash., on the 15th day of March, 1895.

All of Block 430, according to the survey thereof, as shown on the Map of Seattle Tide Lands, filed in the office of the Board of State Land Commissioners at Olympia, Wash., on the 15th day of March, 1895.

All of Block 431, according to the survey thereof, as shown on the Map of Seattle Tide Lands.

[180—91]

REAL ESTATE BELONGING TO THE MERCHANTS' NATIONAL BANK.

EDMONDS.

Block 124, Lots 1, 2, 7, 8, 11.

Block 122, Lots 21, 22, 27, 28, 35, 36.

Block 123, Lots 15, 16, 22.

ANACORTES.

Block 18, north 50 feet of Lots 8, 9 and 10.

KIRKLAND.

Lake Avenue Addition.

Block 21, Lots 27 and 28.

FALLS CITY.

160 acres—The N½ of SE¼ and S½ of NE¼ of Sec. 8 in Township 24 North, Range 7 East, W. M., excepting that certain portion thereof containing one acre, more or less, which is owned by School District No. 48 of King County.

NEAR ORILLIA.

15 acres in Sec. 33, Township 23 North, Range 4 East.

WATER-FRONT WEST SHORE LAKE WASHINGTON.

Maple Leaf Mill Site.

A portion of Lot 2 in Sec. 34, Township 26 North, Range 4 East, in King County.

MONOHON.

5 acres in the W½ of SE¼ of Sec. 27, Township 24 North, Range 6 East, W. M.

SIDNEY.

Several good lots.

SNOHOMISH.

E. C. Ferguson's Plat.

Lot 5 in Block 5.

Snohomish City.

160 acres in Lot 1, Sec. 13, Township 28 North, Range 5 East; also the SW¼ of SW¼ and the E½ of SW¼ and the SW¼ of SE¼ of Sec. 9, Township 28 North, Range 6 East, W. M.

40 acres—The SE¼ of NE¼ of Sec. 12, Township 26 North, Range 3 East, W. M.

ELLENSBURG.

1 Lot—Commencing at a point 80 feet north of the northeast corner of Block 3 in the original town of Ellensburg, County of Kittitas, and running north 3.71 chains; thence west 3.94 chains; thence south 3.85 chains; thence east 3.24 chains to place of beginning; also fraction "F," First Railroad Addition to Ellensburg.

NORTH DAKOTA.

160 acres—Improved farm near Cavalier.

BALLARD.

F. B. Dibble's Addition.

An undivided ⅓ interest in all of Blocks 2, 6 and 18.

NORTH BEND.

385 acres—The NE¼ of SW¼ and S½ of NW¼ and NW¼ of NW¼ of Sec. 3, Township 23 North, Range 8 East. The SE¼ of NE¼ and the NE¼ of NE¼ and W½ of NE¼ of Sec. 4, Township 23 North, Range 8 East, W. M., excepting 40 acres from the said NE¼ of Sec. 4, said 40 acres consisting of all the land in said NE¼ of said Sec. 4, which lies on

the west side of the south fork of the Snoqualmie River, and all the land in said NE¼ of said Sec. 4 lying west of the east branch of said south fork. Lot 8 and SE¼ of SE¼ of Sec. 33 and the SW¼ of SW¼ of Sec. 34, Township 24 North, Range 8 East.

SNOQUALMIE.

W. H. Taylor's Plat.

Block 3, Lot 8.

Block 4, Lots 8, 13, 14, 15, 16, 17, 18, 19 and 20.

Block 5, Lots 1, 2, 10, 11, 12 and 21.

Block 9, Lots 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22.

GILMAN.

Gilman Ranch.

40 acres of SW¼ of NW¼ of Sec. 29, Township 24 North, Range 6 East.

160 acres of SW¼ of Sec. 29, Township 24 North, Range 6 East.

69 acres, undivided ¼ interest in and part of a certain tract of land situated in the SW¼ of SW¼ of Sec. 27, Township 24 North, Range 6 East, and bounded on the south by the county road, on the northwest by the coal branch of the S. L. S. & E. Ry., and on the northeast by the main line of said railway.

160 acres—The S½ of NE¼ and the N½ of SE¼ of Sec. 29, Township 24 North, Range 6 East.

TACOMA.

Elmwood Addition.

Block 25, Lots 1 and 2.

Block 26, Lots 1 and 2.

(Testimony of Joseph B. Hill.)

NEW TACOMA.

Block 7, Lots 8, 9 and 10.

EVERETT.

Hope Addition.

Block 3, Lots 9, 10, 11, 12, 13, 14, 15 and 16.

Also 35 acres on the prolongation of Grand Avenue.

Near Everett.

82 30/100 acres, Lot 8 and the NE¼ of NW¼ of Sec. 22, Township 29 North, Range 5 East, according to the Government survey thereof. [181—92]

Q. You say that was prepared by Mr. Baker?

A. Yes.

Q. With relation to the time that you became accountant in the receiver's office, when was this paper prepared? A. Very shortly after.

Q. You would say, then, the early part of 1897?

A. The early part of 1897. [182—93]

Q. What was done with the copies of these printed papers?

A. They were sent out to different people and used in the office there. I happened to keep this one.

Q. With reference to the creditors of the bank, what was done with them?

A. They were mailed to the creditors.

Q. Now, Mr. Hill, I notice on this paper, on the third page, among the property listed, there are eight pieces of tide land that appear to be located in that locality? A. Yes, sir.

Q. Eight contracts?

(Testimony of Joseph B. Hill.)

A. Eight contracts—eight different blocks.

Q. What effort was made by the receiver, aside from this advertisement, to sell those tide lands and contracts, to your knowledge?

A. Well, they were mailed out to different parties—the assets of the bank.

Q. This circular was mailed?

A. Yes, sir, that circular was mailed.

Q. What other effort did Mr. Baker make, to your knowledge?

A. I do not recall whether they were advertised or not, really.

Q. Do you know whether or not, either by yourself or Mr. Baker, that there was an effort made by solicitation to sell those tide-land contracts by personal solicitation?

A. I do not recall making any myself.

Q. Do you know personally whether Mr. Baker solicited any persons to purchase those tide lands?

A. Not any particular case, but I know that he was anxious to get rid of the assets in a general way, but I cannot recall any particular case.

Q. Now, Mr. Hill, do you remember an inspector or agent or examiner of the Comptroller's Department named Seeley?

A. I do not know him. I do not remember seeing him, but I know there was such a man.

Q. Do you remember any other examiner of the department? A. I do.

Q. Who?

A. Well, I would know the name if I heard it, I

(Testimony of Joseph B. Hill.)

can't think of it now to save my soul. [183—94]

Q. To refresh your recollection, Mr. Hill, do you remember Examiner Wing?

A. Yes, sir, perfectly—I could not think of his name.

Q. Do you remember when Mr. Wing was here?

A. Yes.

Q. About when?

A. Possibly in the fall of 1897, some time after I had been in the office, I do not know the exact date. I would think that would be 1898, because the trust did not last long after 1898.

Q. Did Mr. Wing examine the assets of this bank when he was here? A. He did.

Q. About what length of time did Mr. Wing occupy in the examination of the assets of the bank that were on hand when he was here in 1898?

A. At least two or three days.

Q. In connection with Mr. Wing's examination of those assets did you show him any of the property?

A. I did.

Q. Did you show him any of this tide-land property?

A. I did, and property in West Seattle, too, that we had.

Q. Did you show him generally the real estate that belonged to the bank?

A. Yes, sir, generally the real estate that was left unsold.

Q. Do you know whether or not Mr. Wing made inquiry among any people of Seattle respecting the

(Testimony of Joseph B. Hill.)

property belonging to this bank—do you know whether or not he did?

Mr. KELLEHER.—Do you know of your own knowledge?

A. I do not recall it.

Q. (Mr. GROSSCUP.) Did he examine the books of the trust? A. He did.

Q. Do you know what his purpose was—did he tell you what his purpose was in examining the property of this trust?

A. I cannot recall it. I know it was nearing the end and he wanted to see how long it would take to wind it up—it was nearing the end of the trust.

Q. Mr. Hill, who arranged the sale of blocks 429 and 430 embraced in the tide-land contracts that went to Mr. Simpson?

Mr. KELLEHER.—If he knows. [184—95]

A. Mr. Baker.

Q. (Mr. GROSSCUP.) What was your first connection with that transaction as accountant?

A. When the checks were brought in for settlement and run through the books by me as a cash entry.

Q. That was when whose check was brought in?

A. I can't recall now—Mr. Simpson's, I think.

Q. Mr. Simpson's check? A. Yes, I think so.

Q. And you put the entry through the books?

A. Yes.

Q. Was it you or Mr. Baker that reported it to the department—who made out the report to the department? A. I made out the report.

(Testimony of Joseph B. Hill.)

Q. There has been shown here a report, exhibit 9, now Mr. Hill, how frequently did you make a report to the department? A. Quarterly.

Q. Were those reports made upon forms which were furnished to you by the department?

A. Yes.

Q. And it was the receiver's duty, or his accountant's, to fill out those forms?

A. Yes—they were always passed upon and accepted by the Comptroller.

Q. There has been an exhibit introduced here, Mr. Hill, your quarterly report for November 30, 1897, a photographic copy of that, from which it appears that the first page is a general summary, and then that there are schedules attached to the different classes of property. Was that in the usual form?

A. Yes, sir, that was on the books.

Q. That was the usual form of reporting, was it?

A. Yes, sir; under the different heads.

Q. I call your attention to schedule E of Plaintiff's Exhibit No. 9, and I will ask you to look at schedule E (showing); can you tell from that photographic copy whether that was made by you or not—I mean the written part of it?

A. I can't tell now whether it was or not. [185—96]

The COURT.—You don't know whether that is your writing or not?

A. I wish to state that I am a very poor penman, and those reports were made by a Mr. Tyler, and that is his writing.

(Testimony of Joseph B. Hill.)

Q. (Mr. GROSSCUP.) Do you know whether that is his writing? A. Yes, sir, that is.

Q. Mr. Tyler's?

A. Columbus T. Tyler. It was a very intricate report to make out and I got him to do it and I O.K.'d it.

Q. You got him to do the writing—you employed him to make out these reports?

A. I employed him to make out those reports, and that is his writing.

Q. Was this the usual and ordinary form the reports were made in, as far as you can say?

A. Well, some of them were more elaborate, in fact all of them—yes, sir, they were entered on the different schedules similar to that.

Q. After this transaction in regard to the sales of blocks 430 and 429, to Mr. Simpson, what was the next transaction in those tide lands that you know of, those West Seattle tide lands?

A. They were sold to Mr. Anderson.

Q. Mr. Hill, it is shown here by certain exhibits in evidence that these contracts were assigned to W. D. Hofius & Co. or Hofius and Pigott; as far as you know, who transacted the business in that sale?

A. Mr. Baker.

Q. And with whom?

A. Mr. Anderson, in my presence.

Q. In your presence? A. Yes, sir.

Q. Did you see either Mr. Hofius or Mr. Pigott in that connection? A. I did.

Q. Did you make these entries after that transac-

(Testimony of Joseph B. Hill.)

tion? A. I did.

Q. The entries that relate to these other blocks that went to Hofius and Pigott?

A. Yes. [186—97]

Q. You heard the testimony here about these entries, did you?

A. No. I was turned out—exiled.

Q. Well, Mr. Hill, it is shown that seven blocks were purchased by Hofius and Pigott—the transactions relating to that matter were entered in the books by you? A. Yes.

Q. Do you recall when Mr. Baker left the receivership? A. Yes, sir, it was March or April, 1899.

Q. March or April, 1899?

A. Yes, sir, I think it was the 15th of April he turned the books over to Judge Frater.

Q. Did you leave the receivership at the same time? A. Yes, I did.

A. Yes, I did.

Q. With reference, then, to the time you left the receivership and Mr. Baker left the receivership, when did these transactions by which the West Seattle tide lands, other than the Simpson sale, take place, as far as you know?

A. I didn't quite get that.

Q. When did this negotiation with Anderson begin? A. That was prior to the time we left.

Q. About how long prior to the time that you left the receivership?

A. Oh, a month or two, not over a month or two prior.

(Testimony of Joseph B. Hill.)

Q. Not over. A. No.

Q. How long did that negotiation continue?

A. Not long; a few days. Well, Mr. Baker had to get the consent of the Comptroller—it was also submitted to the Comptroller.

Q. And it was submitted then about the middle of April? A. Yes, or sooner.

Q. Was the matter taken up with the Comptroller?

A. Yes.

Q. Immediately after the transaction was reported?

A. It was taken up with him immediately. It was reported to the Comptroller immediately after the offer was made, for his acceptance, yes. [187—98]

Q. So that the transaction, or the deal took place immediately before the report was made to the Comptroller? A. Yes, sir, I think so.

Mr. BAUSMAN.—I wish to say that what they are talking about now is what is called the Pigott-Hofius sale of the tide lands, and not of block 430 in question.

The COURT.—I understand that from the testimony.

Mr. GROSSCUP.—I was simply connecting the time with reference to the report to the Comptroller.

Q. Between the time of the sale to Mr. Simpson, which appears to have been the latter part of the year 1897, and this sale to Hofius and Pigott in the spring of 1899, what effort was made to your knowledge to sell those tide lands that were purchased by

(Testimony of Joseph B. Hill.)

Hofius and Pigott?

A. The tide lands purchased by Hofius and Pigott?

Q. What efforts were made to sell the remaining tide lands belonging to the trust after the sale to Mr. Simpson?

A. Oh, well, they were advertised and those circulars were gotten out. In fact there was no encouragement to sell anything at that time, but they were advertised.

Q. Mr. Hill, you familiarized yourself with the general market conditions in Seattle in connection with this trust, did you? A. Yes, sir.

Q. Were you under instructions to sell all these remaining assets?

A. At any reasonable price, yes, sir.

Q. Did you make an effort to sell them?

A. I did.

Q. Were there any customers—was there any inquiry at your office for those tide lands prior to a short time before the deal with Hofius & Pigott or with Anderson, which you spoke of?

A. Not at all. We made sales for every application we ever had.

Q. They were the only applications you ever had?

A. Those were the only two.

Q. That is the Simpson and Anderson?

A. The only two chances we ever had to sell anything in the way of tide lands.

Q. In that connection I will ask you did you have applications for other property scattered around the

(Testimony of Joseph B. Hill.)

city and county? [188—99]

A. A very little. There was nothing moving at all.

Q. If men had come to your office with the view of purchasing those tide lands, or had come to the receiver's office for that purpose, would you have likely known of it? A. Yes, sir.

Q. Now, do you know of your own knowledge, Mr. Hill, whether or not those tide lands had any, what you might call a market, any salability in the general market?

A. They had not—they were purely speculative.

Q. (By Mr. GROSSCUP.) Mr. Hill, did you know Sol. G. Simpson in his lifetime?

A. Only by sight.

Q. Just by sight? A. That is all.

Q. You knew Mr. A. H. Anderson?

A. Very well.

Q. And you say it was through Anderson that this deal to Hofius & Pigott was made? A. Yes.

Q. In connection with the taking of office by Mr. Frater did you have anything to do with checking up the account? A. I did.

Q. What length of time was occupied in checking up the accounts with a view to the transfer after Mr. Frater's commission came?

A. It took nearly all day to check up—to check up the accounts of the receiver.

Q. Checking over the assets and making the transfer—how long did it take after Mr. Frater's commission came until the accounts were checked over so

(Testimony of Joseph B. Hill.)

that he could receipt for them?

A. How many days elapsed?

Q. Yes.

A. A very short time; but it took nearly all day to check them up when he did come.

Q. What I was getting at, after Mr. Frater's commission came did you work diligently at that work, checking over the assets of the trust so as to transfer them to Mr. Frater? [189—100]

A. I did, and I got a receipt for them too—I took a receipt.

Q. And you took his receipt for them?

A. I took his receipt for them.

Q. Did this tide-land transaction with Anderson in any way delay the transfer of the assets to Mr. Frater? A. Not at all.

Cross-examination.

Q. (By Mr. KELLEHER.) You say you never knew Sol. G. Simpson in his lifetime?

A. Except by sight.

Q. Never talked with him?

A. Never exchanged a word.

Q. He was never in the office? A. No, sir.

Q. You know nothing about the sale to Simpson—the first you heard of it was after Mr. Baker told you he had sold it and simply asked you to make the entry?

A. Turned in his check and I made the entries.

Q. Do you know whose check it was; whether it was cash or a check, or gold coin, you don't recollect at this time?

A. I think it was Simpson's check.

(Testimony of Joseph B. Hill.)

Q. You think it was, but you don't know?

A. Well, I don't know.

Q. You don't know whether it was a check or cash? A. I am satisfied it was a check.

Q. But whose check it was you don't know?

A. Well, I think it was Simpson's, that is my recollection.

Q. You don't know whether it was Charlie Baker's check, himself?

A. No, it was Simpson's check.

Q. You say you think so?

A. That is my best recollection, yes.

Q. That is all you know about Simpson's sale at all; you knew nothing about it until after it had been accomplished? [190—101]

A. Well, I ran it through the books.

Q. Mr. Baker told you to run the transaction through?

A. The check was brought in and it showed what it was for, and it was run through.

Q. From that time on you stayed after that with the receiver, until April, 1899? A. Yes, sir.

Q. You never heard from Charles H. Baker, or anyone, that Charlie Baker had an interest in Block 430 until about the time this suit was brought, did you, Mr. Hill?

A. Not until some time after the receivership was closed out.

Q. Some time after this present suit was brought—you never heard that Charlie Baker claimed an interest in Block 430 until this suit was brought, a year ago, that is a fact, is it not?

(Testimony of Joseph B. Hill.)

A. Yes.

Q. What is your occupation at the present time?

A. Real estate and loans.

Q. Prior to 1899 you were never in the real estate business—you never were in the real estate business prior to 1900? A. Oh, yes.

Q. You were? A. Yes, about 1898 or 1899.

Q. After you went out? A. Yes, sir.

Q. Not until after you went out of the receivership? A. No.

Q. Previous to that you used to be in a grocery business in Seattle at one time, did you not?

A. That was 1895.

Q. How long did you say you had known Mr. Baker? A. Twenty-three years.

Q. During all that time did you know him pretty well or slightly, or what?

A. Well, he was away for a good many years. [191—102]

Q. But while he was here you knew him very well? Very intimately?

A. No, not very intimately—not intimately, only after I got associated with him.

Q. Until you went into the office in 1897 you were not very well acquainted with him?

A. I was not intimate; I knew him personally.

Q. You knew him pretty well?

A. I knew him pretty well.

Q. But after you got into the office with him you got very well acquainted with him?

A. I saw him every day, yes.

Q. You saw him every day, and he was a fellow

(Testimony of Joseph B. Hill.)

that, for one reason or another in those days, stayed around with you and talked a good deal with you?

A. He was a man I admired very much.

Q. He was a man you admired very much, and he apparently admired you? A. Yes.

Q. You knew he admired you, and as his successor for appointment to this trust he recommended you to the Comptroller? A. I believe he did.

Q. He was very friendly with you?

A. Now I will take that back. I don't think so. I know that the—

Q. (Interrupting.) He wanted you to be his successor?

A. His successor was appointed before I ever thought of it or heard of it—Judge Frater was appointed before I knew anything about it. I know that he got me the position as bookkeeper, in the office, but I don't remember—

Q. (Interrupting.) You don't remember his writing a letter to the Comptroller—you sat here all the morning and you heard that letter read?

A. I did not—I was exiled.

Q. Well, this forenoon you heard a letter read in which Mr. Baker recommended you to Mr. Dawes as his successor, this morning?

A. I don't think I did, I could not have been here, I guess. [192—103]

Q. Anyway you had a high opinion of him and he had a high opinion of you, apparently? A. Yes.

Q. He talked not only about these affairs, but family affairs with you? A. Yes.

Q. Talked about his children and his wife and his

(Testimony of Joseph B. Hill.)

prospects, and his luck, bad and good? A. Yes.

Q. And you were closely associated in those years, 1897, 1898, and 1899? A. Yes, sir.

Q. Very intimate? A. Yes.

Q. And after that your friendship continued?

A. Yes.

Q. He stayed around here for six years afterwards, until about 1905, coming and going a little, but he stayed here as a resident?

A. Off and on, yes.

Q. And when he would come back he would see you pretty often and you would see him in a friendly manner? A. Always friendly.

Q. Always friendly, and talked freely together in all those years, didn't you, until he finally left here in 1905, or about then? A. I think that is so.

Q. That is a fact, is it not? A. Yes.

Q. Since he gave up his permanent residence here about 1905 he has been back on an average of once or twice a year since then, hasn't he?

A. He has been back on several occasions—I don't know whether it has been as often as that. I don't think he has been back here eight times in eight years, I don't think so.

Q. You went on in a friendly way to him as a witness for him in Chicago this last spring, didn't you?

A. Yes. [193—104]

Q. He saw you there and entertained you there at lunch or dinner? A. I saw him there, yes.

Q. You kept up your intimate acquaintance and friendship for him ever since you have been associated with him, from 1897 to 1899?

(Testimony of Joseph B. Hill.)

A. We always had been friendly, yes. [194—105]

[Testimony of Dr. Alfred Raymond, for Defendants.]

Dr. ALFRED RAYMOND was produced as a witness on behalf of the defendants and testified as follows:

That he is a physician and surgeon by profession, having been in active practice for 27 years, of which 23 years were in Seattle. That he is the attending physician upon A. H. Anderson. That Mr. Anderson had been under his care for about eighteen months. That he is suffering from a high degree of arterio schlerosis. That Mr. Anderson had one very severe spell this fall of angina pectoris which nearly ended his life. That his disease is one of the arteries in which the nutrition of the brain is interfered with, and that interference varies in degree from that which can be very mild to complete softening of the brain. That Mr. Anderson had already lost the sight of one eye from an interocular hemorrhage. That he had attacks of lapses of unconsciousness, in which he may not be obliged to fall, but in some of them he had fallen. That his blood pressure is extremely high. That arterio schlerosis does affect the brain cerebration in a pronounced degree.

In answer to a question as to whether it would be safe to put Mr. Anderson upon the witness-stand, the witness stated that this was a very difficult question to answer as there are some days when Mr. Anderson is very gloomy and melancholy and low-spirited, while other days he is more cheerful. That the par-

(Testimony of Dr. Alfred Raymond.)

ticular mood in which he might be found at the time would be very important. The witness stated that Mr. Anderson's wife, with whom he had several conferences, stated that Mr. Anderson was getting childish. This fact, the witness stated, he likewise had noticed. As to how this trouble would affect his memory, the witness stated that this was pretty hard to gauge or tell. That one would have [195—106] to live with Mr. Anderson to determine this; would have to be constantly with him. The witness further stated that the disease was incurable, and that he did not expect Mr. Anderson to get any better.

On cross-examination, counsel for the plaintiff asked witness if he knew that Mr. Anderson, who was under subpoena, had been in the courtroom during the trial, to which he answered in the negative.

Mr. Grosscup made the following statement to the Court:

Mr. GROSSCUP.—If the Court please, it has been arranged with counsel that without my going on the witness-stand I may make a professional statement, and it will be accepted the same as if under oath.

On Wednesday morning I called on Mr. Anderson in company with Mr. Charles H. Baker for the purpose of ascertaining his knowledge concerning the transactions involved in this case. I had known Mr. Anderson for a considerable period of time. After a little preliminary talk relating to his health, and in a casual way, I asked him if he remembered anything about the West Seattle tide lands. He stated to me that he remembered absolutely nothing about

(Testimony of Dr. Alfred Raymond.)

it. I asked him if he did not remember arranging a sale with Hofius and Piggot. He said he did not; said he did not remember a thing about the West Seattle tide lands; that he did not remember that he had ever been connected with them. I reminded him of some documents here, and what would be the evidence, showing that he had transacted one of these deals. He said he remembered nothing about it. I asked him what he remembered about Mr. Simpson. He said he remembered that there was a Mr. Simpson, but nothing more. [196—107] I asked him where his office was. He said he didn't know—I mean his office and Mr. Simpson's office—I knew they had officed together in those days—and he declared to me an absolute total lack of memory upon the whole subject, and upon the whole time, and of every other incident about which I knew that he was connected in those days. I asked him, among other things, if he had been a director in the Snoqualmie Falls Power Company with Mr. Baker at the time the company was formed in 1898. He said he did not know that he had ever been a director; he did not know that Mr. Simpson had ever been a director. He said he remembered that there was such a company, but he didn't know a thing about it. I happened to know about all those things very well and I made my mind up from talking with him that he had a total lapse of memory.

I make this statement to show why he is not called here as a witness.

Mr. BAUSMAN.—I beg the privilege likewise to make a professional statement.

(Testimony of Dr. Alfred Raymond.)

I have had two conversations with Mr. Anderson respecting this case. One was about a week ago. I spoke to him about Mr. Simpson—this was over the telephone—he called me up to ask whether this case would surely last more than two or three days—he was then under subpoena, and asked me what would be the probable delay; that he was going to Europe on the "Imperator" early in March with a friend of his in this city, Mr. Tucker. I told him that I did not think the case would take more than two or three days. He said he desired to know that because although he would have time to catch the "Imperator," [197—108] he desired to spend a day or two at his country place before going. He *told he* was not well. I know that he is not well, to be frank about it. I asked him if he knew anything about Mr. Simpson and Mr. Baker with reference to these tide lands. He said he recalled only in a general way that Baker used to be down there at the office where he was with Mr. Simpson, in the Union Block. I said, "Do you remember any transactions between them?" He said, "No, I don't recall any." I saw him again in this courthouse here to-day, and he was again asking whether he would be at liberty, in my opinion, to be off. He was not my witness and I told him I could not decide that. He said, "Really, Mr. Bausman, I don't know anything about this business at all." I had stated to him in a rough way what the controversy was. He said, "I don't recall anything about these tide lands except in a very general way, and I could testify to nothing as to Mr. Baker and Mr. Simpson, except that they

(Testimony of Dr. Alfred Raymond.)

were friends, and that is all I know, friends of mine —we were all friends together." He said, "I cannot recall anything." And I mentioned to him one of the transactions of this case, the sale in 1897, the alleged sale to Mr. Baker, and also accordingly mentioned to him the alleged repurchase by Baker in 1899 from Simpson, while Baker was still receiver. He said, "Now, if Baker said I was present at any of those things I cannot recall them at all," and that was all.

Mr. GROSSCUP.—Well, he stated to me that he did not even know that Simpson and Baker had ever had any transactions.

Mr. BAUSMAN.—I am free to say to your Honor, as a conclusion of the matter, that the witness seemed to remember all [198—109] the personages very well, but had no knowledge, as far as he stated, of the events.

The COURT.—Proceed.

[Testimony of E. C. Townsend, for Defendants.]

E. C. TOWNSEND was produced as a witness on behalf of the defendants. This is the same witness as produced by the plaintiff, being the engineer from the office of the Commission of Public Lands at Olympia.

The witness identified a letter from Norwood W. Brockett to the State Land Commissioner dated September 15, 1905, which was received in evidence and marked Defendants' Exhibit "A-4," and reads as follows:

Defendants' Exhibit "A-4" [Letter, Dated September 15, 1905, Norwood W. Brockett to State Land Commissioner].

SEATTLE-TACOMA POWER COMPANY.

Legal Department.

Seattle, Washington, Sept. 15, 1905.

Thomas B. Hardin,
General Attorney.
Norwood W. Brockett,
Assistant Attorney.
In replying to this letter
please refer to these
initials and number
—N. W. B. Per-
sonal.

State Land Commissioner,
Olympia, Washington.

Dear Sir:

I am informed by Mr. A. S. Norton of New York City that he has recently sent you land contract No. 727 covering block 430 of Seattle Tide Lands, duly assigned to A. S. Norton by Sol G. Simpson and Mary M. Simpson, his wife, by Mark E. Reed their attorney.

I desire to inform you that Mr. Reed's power of [199—110] attorney from Sol G. ~~Simpson~~ and Mary M. Simpson has been recorded in Thurston County bearing auditor's number 30883, recorded August 24, 1905, in volume 7 of Misc. records at page 131.

I presume that in issuing the deed to A. S. Norton

you will desire to ascertain Mr. Reed's authority for making the assignment for Simpson and wife which same can be found in the before-mentioned power of attorney. If it is necessary that you have a certified copy of this power of attorney kindly let me know at once in order that I may have the same prepared and delivered to you.

If through any reason Mr. Norton has neglected to enclose the fee for issuing the deed, or if the issuance of the deed is held up for any cause, kindly let me know at once.

Very respectfully,
NORWOOD W. BROCKETT.

Received.
Sep. 18, 1905.
Commsr. Pub. Land.

The witness identified a letter from Norwood W. Brockett to H. P. Niles, Assistant Commissioner of Public Lands, dated September 23, 1905, and the same was received in evidence and marked Defendants' Exhibit "A-5," and reads as follows:

Defendants' Exhibit "A-5" [Letter, Dated September 23, 1905, Norwood W. Brockett to Asst. Commissioner of Public Lands].

SEATTLE TACOMA POWER COMPANY.

Legal Department.

Seattle, Washington, Sept. 23, 1905.

Thomas B. Hardin,
General Attorney,
Norwood W. Brockett,
Assistant Attorney.

In replying to this letter
please refer to these
initials and number
—N. W. B. Per-
sonal.

H. P. Niles, Esquire,
Assistant Commissioner of Public Lands,
Olympia, Washington.

Dear Sir:

Your letter of September 21, 1905, enclosing original [200—111] and assignment of contract No. 728, together with the assignment of Harbor Area Lease No. 181, received.

I have communicated with Mr. Norton and will let you know as regards the issuing of the deed as soon as I receive a response from him. I have forwarded to Mr. Norton the assignment of the Harbor Area Lease with instructions that he attach the same to the original, execute a new bond and forward all the instruments to you without delay.

Thanking you for your courtesy in this matter, I remain,

Very truly yours,
NORWOOD W. BROCKETT.

file with cont. Tide Land 728.

The witness' attention was called to the inscription at the bottom of Defendants' Exhibit "A-5," reading "file with cont. Tide Land 728," and he stated that this was put on there by the office of the Land Commissioner.

The witness identified a letter from Norwood W. Brockett to H. P. Niles, Assistant Land Commissioner, under date of October 7, 1905, and the same was received in evidence and marked Defendants' Exhibit "A-6," and reads as follows :

Defendants' Exhibit "A-6" [Letter, Dated October 7, 1905, Norwood W. Brockett to Asst. Commissioner of Public Lands].

SEATTLE TACOMA POWER COMPANY.
Legal Department.
Seattle, Washington, Oct. 7, 1905.

Thomas B. Hardin,
General Attorney.
Norwood W. Brockett,
Assistant Attorney.

In replying to this letter
please refer to these
initials and number
—N. W. B. Per-
sonal.

H. P. Niles, Esquire,
Assistant Commissioner of Public Lands,
Olympia, Washington.

Dear Sir:

In accordance with your letter to me of September 21, [201—112] 1905, and my letter to you of September 23, 1905, enclosed you will please find original and assignment of contract No. 728 covering all of block 430 Seattle Tide Lands, upon which I wish you would kindly issue a deed to A. S. Norton, reserving to the Seattle and San Francisco Railway and Navigation Company the easement as set forth in your letter to me of September 21st.

I have communicated with Mr. Norton and he is willing that the deed should issue to him subject to this prior right of way assignment. As soon as the deed is issued kindly forward the same to me.

I have sent on to Mr. Norton Harbor Area lease No. 181 with instructions that he execute a new bond as required by your letter and if you have not already received the same direct from him you will shortly.

Thanking you for your courtesy in this matter, I remain.

Very truly yours,
NORWOOD W. BROCKETT.

Received
Oct. 11, 1905,
Commsr. Pub. Land.

The witness identified a letter from Norwood W. Brockett to H. P. Niles, Assistant Commissioner of Public Lands, under date November 6, 1905, and the same was received in evidence and marked Defendants' Exhibit "A-7," and reads as follows: [202—113]

Defendants' Exhibit "A-7" [Letter Dated November 6, 1905, Norwood W. Brockett to Asst. Commissioner of Public Lands].

SEATTLE TACOMA POWER COMPANY.

Legal Department.

Seattle, Washington, Nov. 6, 1905.

Thomas B. Hardin,
General Attorney.
Norwood W. Brockett,
Assistant Attorney.

In replying to this letter
please refer to these
initials and number
—N. W. B.

Mr. H. P. Niles,
Assistant Commissioner of Public Lands,
Olympia, Washington.

Dear Sir:

In your letter to me of October 11, 1905, I note that you write that the deed to block 430, Seattle Tide Lands, under contract No. 728, had been prepared and was awaiting the Governor's signature. Kindly let me know if the deed has been signed and recorded, and, if so, please forward the same to me.

Very truly yours,
NORWOOD W. BROCKETT.

Received
Nov. 8, 1905,
Commsr. Pub. Land.

The "Received" mark upon these letters the witness stated was placed there by his office.

All the foregoing letters were filed with tide-land contract No. 728.

[Testimony of Charles H. Baker, on His Own Behalf.]

CHARLES H. BAKER, one of the defendants, was produced as a witness on behalf of himself and the other defendants and testified as follows:

That he became a resident of the State of Washington in 1887. That immediately after leaving Cornell University he came to the State of Washington. That from 1887 to [203—114] 1893 he practiced his profession that of civil engineer, and as such he became connected in 1892-93 with the building of an electric light and power station for the Third Street Railroad owned by D. T. Denny and sons. That he was paid for these services in notes of the company, secured by bonds of the company, indorsed by D. T. Denny and sons. That the name of this company was Rainier Power & Railway Company. That he borrowed money and put up these notes and bonds as collateral. That as a result of the panic in 1893, the Denny enterprise failed, the effect of which was to embarrass the witness upon the money which he had borrowed, and as a result thereof about $60,000 of judgments were obtained against the witness.

That in 1895 he sought to become postmaster of the City of Seattle, and in aid thereof received the indorsement of many people in the city. That after the failure of the Merchants' National Bank in 1895, he became an applicant for the receivership and used the recommendations that were given him for

(Testimony of Charles H. Baker.)

the postmastership to aid him in securing the appointment as receiver. That the Comptroller of the Currency secured these recommendations from the Postoffice Department. That among other numerous recommendations was a letter from Mr. Fred Bausman, one of the attorneys for the plaintiff in this case, which was identified by the witness, received in evidence and marked Defendants' Exhibit "A-8," and reads as follows: [204—115]

Defendants' Exhibit "A-8" [Letter, Dated August 28, 1894, Fred. Bausman to President of the United States].

Frederick Bausman.
Daniel Kelleher.
G. Meade Emory.

BAUSMAN, KELLEHER & EMORY,
Attorneys at Law.
Rooms 626-7-8 Bailey Building.
Seattle, Washington, Aug. 28, 1894.

P. O.
P. O. Department.
Received
Sep. 7, 1894.
Office of Chief Clerk.

To His Excellency
The President,
Washington, D. C.

Sir:

Learning that my friend Charles H. Baker of this City has become an applicant for the place of postmaster at Seattle, I take great pleasure in respectfully adding my recommendation to that of his many

(Testimony of Charles H. Baker.)

friends. Mr. Baker has lived among us for seven years, has been prominently identified with many important business projects, has always been a consistent Democrat and is a man of irreproachable private character. I have not the slightest doubt of his discharging the duties of the place with the highest credit and public satisfaction.

FRED BAUSMAN.

That in 1895 he was appointed receiver of the Merchants' National Bank.

Q. In connection with that receivership you took charge of *of* all of the assets of the bank?

A. I did.

Q. According to the exhibits that have been put in evidence here, Mr. Baker, among the things which came into your possession was an application made by Mr. Mackintosh prior to the failure of the bank, to the State Land Commission for the right to buy certain tide lands at West Seattle, that is shown by the exhibits? A. Yes.

Q. And it is also shown that you asked permission of the Comptroller of the Currency to prosecute those applications? A. Yes.

Q. In the year 1897 to what extent had the assets of this [205—116] bank been collected, say the latter part of the year 1897?

A. I had paid either thirty or forty per cent dividends. The liquid assets had all been disposed of. The assets that were remaining were very slow and it was almost impossible to realize upon them.

Q. Did they consist, in part, of the real estate?

(Testimony of Charles H. Baker.)

A. Very largely of real estate.

Q. Were you visited from time to time by examiners accredited by the Comptroller of the Currency?

A. Yes.

Q. What was the attitude of those examiners, and of the department which you were serving, with reference to the disposition of those remaining assets, with a view to closing up the trust?

A. The judgment of the examiners was that they should be disposed of as soon as they could and the trust wound up.

Q. Now, with reference to the sale of real estate, was there a particular anxiety to get rid of those real estate assets? A. There was.

Q. As a result of that, it has been shown here by the exhibits that an order was procured allowing you to exchange what are designated as receiver's certificates for real estate; do you recall such order?

A. There was such order, yes.

Q. What were those receiver's certificates that are referred to?

A. When a bank first goes into a receiver's hands the liabilities are scheduled and when they are approved the receiver issues his certificates on that claim, which is then popularly known as a receiver's certificate.

Q. In other words, it is the evidence of an approved claim? A. Yes.

Q. Were those issued to depositors and other creditors of the Merchants' National Bank?

A. Everyone who could prove a claim against it.

(Testimony of Charles H. Baker.)

Q. Now, Mr. Baker, I show you Defendants' Exhibit "A-2," which is put in evidence in connection with the testimony of Mr. Hill, and I will ask you about when that circular was published and in what manner it was distributed.

A. This circular was published early in 1897. [206—117]

Q. How was it distributed?

A. This was mailed to the stockholders and creditors and principal real estate men around town, and other people who were in the habit of investing.

Q. Was that mailed to all the creditors, so far as you had a list of them? A. Yes.

Q. And those receiver's certificates which are referred to in the circular, then would mean the creditors of the estate? A. Yes.

Q. You say in this document: "In view of the great difficulty and necessary sacrifice in converting into cash the real estate and other assets of this trust, I have been authorized by the Comptroller to effect exchanges of such assets for outstanding receiver's certificates with such holders as may desire to do so upon a satisfactory basis." In what manner were those exchanges made—how did you conduct that business?

A. They would surrender their claims, and real estate would be given to them in lieu thereof.

Q. Now, in making those bargains by which you would transfer real estate for claims against the bank, who had the discretion for fixing the terms?

A. I did.

(Testimony of Charles H. Baker.)

Q. That was given to you by the Comptroller, was it? A. Yes.

Q. Prior to the first of November, 1897, did you have an application in response to this circular, or otherwise, from any creditor of the bank to exchange his claim against the bank for any of these listed Seattle tide lands?

A. I do not recall that there was any application.

Q. Was there any application to purchase those tide lands?

A. None whatever. There were no applications to purchase the tide lands, and I do not remember that there were to purchase the other assets either.

Q. What were the terms which you were ready to offer in that respect—well, did you put a price upon those lands? A. No.

Q. In other words, did this circular or this effort to make these exchanges in any way enable you to dispose of those tide lands or other lands?

A. No, it did not serve any useful purpose. [207—118]

Q. What was the condition of what might be called the outside real estate market at that time?

A. It was absolutely dead. There was not a market.

Q. And for what period of time did this dead condition continue, with reference to your receivership; did it continue to the termination of your receivership? A. Yes.

Q. Now, Mr. Baker, it has been shown here by the exhibits in this case that in the month of November,

(Testimony of Charles H. Baker.)

1897, there was a transaction by which Mr. Sol G. Simpson became the assignee of certain Seattle tide-land contracts—the record shows that there were two contracts, 727 covering block 429 and 728 covering block 430, the land office numbers being 727 and 728; the record shows that they were transferred to Sol G. Simpson under date of November, 1897. Now, you may state fully to the Court just what occurred in connection with this transfer to Sol G. Simpson.

A. When the examiner was here he said that the practice of the Department, when the assets got slow and stagnant, was to close them up as expeditiously as they could by private sale, and to that end they authorized the receivers, under a blank order, to make the best sales an disposition that they could. Mr. Seeley was the examiner here at that time and he, therefore, had a petition prepared to the Court to authorize such a general order, and a general order from the Comptroller was obtained.

Mr. BAUSMAN.—A general order what?

A. (Continuing.) From the comptroller. Then in the latter part of November, 1897, I took these contracts to Mr. Simpson and Mr. Anderson and tried to get them to buy them. I wanted them to buy all the bank's holdings, and Mr. Anderson was not interested and did not see anything in them. Mr. Simpson did not, but he asked me to make price on them, and the price I made was the cost of it plus fifty dollars on each contract, and Mr. Simpson said he would take two of them. So that disposed of the

(Testimony of Charles H. Baker.)

first two of the bank's holdings in tide lands, and that was the first offer, with the exception of a dollar apiece that had been obtained, since we had them.

Q. You say you had had an offer of a dollar apiece, when was that offer made?

A. Well, that was made about the middle of 1897, I should say.

Q. Was that offer of a dollar apiece for the assignment of the contract as it then stood, or a dollar apiece profit to the trust?

A. A dollar apiece for the contract as it stood.

Q. You had made at that time payments to the State? [208—119] A. Yes.

Q. And Mr. Simpson was to pay you, in addition to what you had paid to the State, fifty dollars for each contract, was that correct? A. Yes.

Q. That was your arrangement with him?

A. Yes.

Q. Did Mr. Simpson give you any money or other equivalent of money with which to consummate this transaction?

A. I think he gave his check for it.

Q. In determining how much you had in these contracts, from whom did you get the information, that is how much the trust had in them, from whom did you get the information?

A. From Mr. Hill, who was the clerk.

Q. He was your clerk and bookkeeper, wasn't he?

A. Yes.

Q. And to the result given you by Mr. Hill, then you added fifty dollars, is that what I understood

(Testimony of Charles H. Baker.)

you to say was done?

A. Added fifty dollars to the figures given me by Mr. Hill.

Q. If there was an error in that computation, it resulted in that way, did it? A. Yes.

Q. At that time, Mr. Baker, and for a considerable time after that did you have any reserve interest, in expectancy or actual, present or in expectancy, in those two contracts? A. I did not.

Q. Did you at that time have any expectation of ever acquiring any interest in those two contracts?

A. I did not.

Q. What were the personal relations between you and Mr. Simpson at that time?

A. I had known Mr. Simpson for about three years and we were very good friends.

Q. Was Mr. Simpson a man of large affairs?

A. Well, Mr. Simpson was reputed to be the largest lumberman on the Sound and a very wealthy man.

Q. Was he a man who speculated to some extent in property? [209—120]

A. Yes, sir, he was always taking flyers.

Q. Was Mr. Anderson a friend of yours at that time? A. He was.

Q. Were Mr. Anderson and Mr. Simpson friends?

A. They were very close friends.

Q. How did they office?

A. They had an office—a suite of offices downtown in the Union Block; two or three rooms. They had a room together with a stenographer, and they had

(Testimony of Charles H. Baker.)

a couple of other rooms where their clerks were.

Q. Were they business associates, do you know?

A. Yes, they were.

Q. And they were both good friends? A. Yes.

Q. Shortly after this transaction in November, or contemporaneously with it, Mr. Baker, do you know what was done with reference to reporting the matter to the Comptroller of the Currency?

A. Well, it was entered in the quarterly report.

Q. In the usual and ordinary way of those reports?

A. Yes.

Q. Have you examined the exhibit which has been put in here as Exhibit No. 9, I believe it is, showing the quarterly report for the 30th of November, 1897, the one which was put in here at the trial?

A. I saw it when it was introduced.

Q. Was that the ordinary form of report which was sent to the comptroller?

A. That was the usual way.

Q. And those tide-land lots were listed there by number, were they not? A. I think they were.

Q. Was the money remitted to the comptroller?

Mr. BAUSMAN.—The tide-land lots or blocks were not referred to in that report, but only the number of the contract.

Q. (Mr. CROSSCUP.) The tide-land contracts were listed by number?

A. I suppose they were—I do not recall how it was done. [210—121]

Q. They were listed in your office by number, were they not? A. They were.

(Testimony of Charles H. Baker.)

The COURT.—I would like to ask one question here, and that is whether a report was made to the Comptroller of the Currency at the time of the purchase of those tide lands from the State and the contract received from the State for the purchase?

The WITNESS.—I do not remember whether it was made at the time or the next quarterly report.

The COURT.—Well, was it made at any time?

A. Yes, sir.

Mr. GROSSCUP.—The exhibit shows the money.

Mr. BAUSMAN.—Only it is shown by this exhibit.

The COURT.—I mean whether the comptroller's office knew whether contract No. 727 and 728 represented the purchase of these blocks from the State.

Mr. BAUSMAN.—No, sir; there is no such report.

Q. (Mr. GROSSCUP.) Did those numbers show the listing in your assets? A. They did.

Q. And the contract number would refer to the tide lands, so that in checking up those numbers it would be shown from the record what tide lands were transferred? A. Yes, sir, it would.

Mr. GROSSCUP.—It would be shown by the books that these were all entered among the assets by the contract numbers of the records at Olympia.

The COURT.—My inquiry was whether the comptroller's office showed them in that manner. Were they listed in your list of assets by number, by the land commissioner's number?

A. They were.

Q. (Mr. GROSSCUP.) Now, Mr. Baker, you say Mr. Seeley checked up and procured this order from the comptroller; just state how that business was

(Testimony of Charles H. Baker.)

handled in your office.

A. Mr. Seeley was here—

The COURT.—My inquiry was whether the comptroller's attention was called to the fact that No. 727 and 728 represented blocks in the tide lands.

Mr. GROSSCUP.—They could ascertain that when they looked at their list. [211—122]

Q. I will ask you, Mr. Baker, with reference to the additional assets, were they reported to the comptroller, that is, when you acquired those tide land contracts were they reported to the comptroller by contract number of the land office at Olympia, that is the land office contract number.

A. They were reported by contract numbers and I think by block numbers as well.

Q. (Mr. GROSSCUP.) Contract number covering certain blocks? A. Yes.

Q. (Mr. GROSSCUP.) Now, Mr. Baker, do you know what has become of Mr. Seeley?

A. Mr. Seeley is dead.

Q. I will ask you whether you ever had any intention or design, in reporting this sale to the comptroller, of concealing or covering up anything?

A. I never had any such intention. Never was any such intention.

Q. Do you know, as a matter of fact, whether the comptroller did know that you had sold those blocks, or his examiner?

Mr. BAUSMAN.—I object to that.

Mr. GROSSCUP.—I am asking whether the comptroller or any of his examiners knew it.

A. His examiners knew about it.

(Testimony of Charles H. Baker.)

Q. After this sale was your office examined, along in the early part of 1898?

A. I think it was examined about every six months.

Q. Now, Mr. Baker, in the early part of 1898 did you take on or take over a private enterprise known as the Snoqualmie Falls Power Company?

A. I organized the enterprise myself—promoted it.

Q. In connection with that corporation which was formed—when was the corporation formed?

A. The Snoqualmie Falls Power Company was organized in January, 1898.

Q. Who were the trustees of that company?

A. Mr. Anderson, Mr. Simpson, myself and Mr. Spencer, I think—

Mr. BAUSMAN.—And Mr. Lester Turner was one too, wasn't he?

Mr. GROSSCUP.—No, not at that time—well, it is not material—the other was Judge Burke, I think in the beginning. [212—123]

Q. Did you begin about that time the actual construction of what is known as the Snoqualmie Falls Power plant? A. I did.

Q. In connection with that power plant—the purpose of that power plant was to supply electricity as a public service corporation, was it not?

A. That was the purpose, yes.

Q. Did that power plant get into business rivalry with other competing interests in the power field?

A. Yes, it immediately aroused the antagonism of the General Electric Company which was interested—

Q. Did this business rivalry lead to charges against

(Testimony of Charles H. Baker.)

you in the administration of your trust as receiver of the bank, to your knowledge, answer that yes or no.

Mr. BAUSMAN.—I object to that.

The COURT.—What is the purpose of the question?

Mr. GROSSCUP.—I have no objection to stating the purpose of the question. I want to show that that business rivalry resulted in a very scrutinizing investigation of this trust.

Mr. BAUSMAN.—Go ahead.

A. (By the WITNESS.) It did.

Q. (Mr. GROSSCUP.) Had there been opposition to your appointment as receiver?

A. There was a very great opposition to my appointment.

Q. Do you know whether or not charges were made against your administration of this trust, along about the year 1898, and from then on?

A. Yes, there were a good many charges—there were several charges.

Q. Do you know whether a special examiner came here to investigate those matters?

A. Mr. Wing was a special examiner and he came for that purpose.

Q. At the instance of whom, as you were informed?

A. The comptroller.

Q. Now, you may state to the Court what examination Mr. Wing made of the affairs of your trust.

A. He made the usual examination that every examiner makes as to the condition of the assets, of the assets which had been liquidated and so forth, and

(Testimony of Charles H. Baker.)

then he stated that [213—124] he had been charged to investigate a number of complaints that had been filed, and particularly complaints with reference to Anderson and Simpson. Just what the complaints were he did not disclose except that they were complaints.

Q. Did he examine your books in that connection?

A. He did, yes.

Q. Did he make an unusually close examination of the properties that were remaining? A. He did.

Q. Now, do you know whether or not he was informed at that time of the sale of those two blocks No. 429 and 430 to Sol G. Simpson?

A. Yes, he was informed.

Q. And he was informed of the price at which you had sold them? A. He was.

Q. Was that a part of the investigation which he was making?

A. That was a part of the investigation.

Q. Mr. Hill testified here yesterday that he accompanied Mr. Wing over to West Seattle to see the tide lands; do you know whether he examined the balance of those tide lands in connection with the matter?

A. He went for that purpose and I suppose he did.

Q. In other words, that was the purpose you know that he went for? A. Yes.

Q. Did you discuss with Mr. Wing the value of those tide lands at that time, and the market conditions surrounding them? A. I did.

Q. Mr. Baker, before Mr. Wing left here did you have any conversation with him as to his conclusions

(Testimony of Charles H. Baker.)

about this investigation and what his report would be? A. No, he said nothing to me about it.

Mr. BAUSMAN.—This was in what year, 1898?

A. This was in 1898.

Q. About a year after the sale to Simpson?

A. I think it was. [214—125]

The COURT.—Proceed.

Q. (Mr. GROSSCUP.) Mr. Simpson was then living?

Mr. BAUSMAN.—Yes, the record shows that.

A. Mr. Wing interviewed Mr. Simpson and Anderson and a great many people around town, and the people in town who had made some complaints, and bankers and business men generally he interviewed.

Q. Mr. Baker, it appears from the correspondence here that the one matter left against you was your note in the bank and the controversy over this note; now, was or was not that the only thing left after these investigations, to your knowledge?

A. Yes, that was one of the complaints.

Q. Now, Mr. Baker, when did you first have any further offer or any offer for the balance of the West Seattle Tide Lands?

A. The next offer was early in 1899.

Q. About when, and by whom?

A. Mr. Anderson.

Q. Now, state what his offer was and just what occurred.

Mr. BAUSMAN.—At this time may I ask him to fix what time in 1899—he said early—about what month?

A. In the spring.

(Testimony of Charles H. Baker.)

Mr. BAUSMAN.—What month?

A. March, I should think.

Mr. GROSSCUP.—With reference to a certain letter here to the comptroller in which you reported a tentative agreement, how long before that letter was it?

Mr. BAUSMAN.—The letter was dated March 22d, I believe.

A. Well, I suppose it was immediately before.

Mr. BAUSMAN.—March 22, 1899?

A. Yes.

Q. (Mr. GROSSCUP.) In order to fix the time, this report was the conclusion of your negotiations with Mr. Anderson, is that correct? A. Yes.

Q. In connection with that negotiation with Mr. Anderson for the balance of these blocks, or the balance of these contracts, did you have any conversation with Mr. Simpson? A. I did. [215—126]

Q. And did or did not the negotiation—what was the fact about it—the negotiation with Mr. Anderson, in any way involve block 429?

A. I do not know whether it did or not.

Q. But you had a conversation, you say, with Mr. Simpson at that time? A. Yes, sir.

Q. Now state fully to the Court what that conversation was as far as you can remember it at this late date; the substance of it.

A. Well, I do not remember—

Mr. BAUSMAN.—We will object to these conversations with Mr. Simpson as self-serving in their nature, and we will reserve the argument to a later time.

(Testimony of Charles H. Baker.)

A. Shall I answer it?

Mr. GROSSCUP.—Certainly.

A. About this time Mr. Simpson said he was going —or was thinking of selling the other two blocks.

Mr. BAUSMAN.—This was in March, 1899?

A. Yes. Mr. Anderson's negotiations were for everything the bank held except the two blocks of Mr. Simpson's and Mr. Simpson talked of selling those two blocks, and I asked him if he would not sell me one and he said he would, so I bought block 430 for the cost of it and interest.

Mr. BAUSMAN.—The cost of it—may I ask him—

The WITNESS.—What he paid for it.

Mr. BAUSMAN.—You were still receiver?

A. Yes, I was receiver. I did not go out for a month after that, I think.

Q. (Mr. GROSSCUP.) Was this a personal transaction on your part? A. Yes, it was.

Q. Now, state fully what that transaction was and how you consummated it, state fully what occurred.

A. Well, I told him I would like to have him carry the title of it for me. I gave him a note for his advances and interest and I asked him to carry the title of it until I would get rid of my judgments. I was consolidating the street railways in Seattle and promoting this power company deal and had a large expectancy through the success of those projects, and he agreed to do it. That was the arrangement. [216—127]

Q. Was he at that time a director in the Snoqualmie Falls Power Company, or a trustee, I mean?

(Testimony of Charles H. Baker.)

A. Yes.

Q. He had an interest in that company—some interest in that company?

A. Yes, he had—a prospective interest.

Q. Had he a prospective interest—you say he had a prospective interest—in what way did he have a prospective interest—just very briefly, I don't want to go into the details of it.

A. Well, of course, I had a prospective interest in it by virtue of a stockholder.

Q. Well, he knew your prospects, that is what I want to get at. A. Yes, he knew of it.

Q. He knew all about the whole business?

A. Yes.

Q. At that time, Mr. Baker, did you believe that this West Seattle tide land properties had any greater value than the price that Mr. Anderson was agreeing to pay for them? A. No, I did not.

Q. What was the reason that Mr. Simpson was willing to turn this contract over to you covering block 430 at what it had cost him with interest, without any profit?

Mr. BAUSMAN.—I object to that.

Mr. GROSSCUP.—What did he say on that subject, if he said anything?

Mr. BAUSMAN.—He can answer it in that form, subject to our general objection to the conversations.

Mr. GROSSCUP.—What did he say, if anything?

A. Well, I don't know that he said anything. I reminded him that he was interested with me in the result of the power company, which he had great faith in himself.

(Testimony of Charles H. Baker.)

Q. Was or was not Mr. Simpson at that time a man of large wealth?

A. I suppose he was one of the wealthiest men in the Puget Sound country.

Q. When did Mr. Simpson become interested with you in the power company and its affiliated enterprises.

A. Well, he was interested before the power company matured, because the power company was an incident or offshoot of the consolidation project that I had to consolidate the [217—128] street railways here.

Q. Now, Mr. Baker, I see upon these letterheads "Seattle-Tacoma Power Company," I will ask you if that was the successor of the Snoqualmie Falls Power Company? A. It was.

Q. Were you the president of that company?

A. I was.

Q. Up to what time?

A. I was president until November, 1904.

Q. Who were the general attorneys of that company? A. Mr. Hardin.

Q. Who was associated with him as one of the general attorneys? A. Mr. Brockett.

Q. And were they your private counsel also?

A. Yes, they were.

Q. In the years 1906-7 were you in litigation in connection with securities growing out of this enterprise—just state whether you were or not.

A. I was.

Q. Was Mr. Hardin and Mr. Brockett in any way your counsel in those litigations?

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(Testimony of Charles H. Baker.)

A. They were not counsel of record.

Q. Well, did they represent you? A. No.

Q. In what way did they represent you in your private affairs?

A. Anything that I had in a legal line they represented me in.

Q. Was their connection with you well known in this community as your attorneys?

A. Yes; they had no other connection except with me. Mr. Hardin had given up his private practice to join me.

Q. You dissolved your relations with the receivership in April, 1899—Mr. Frater has testified that his commission was sent you for delivery, and also his bond, I believe he said. A. Yes. [218—129]

Q. What was done with reference to transferring all the property to Mr. Frater? I mean the property of the bank now.

A. The remaining assets were canvassed between Mr. Frater and Mr. Hill, and Mr. Frater receipted for then and took possession, and delivered his bond and his commission had been sent to me by the comptroller and I delivered that to him when he delivered his bond and receipted for the assets.

Q. In connection with the examination of your trust from time to time were the books gone over at each examination?

A. At every examination the books were analyzed.

Q. And did the account show what assets had been disposed of during that quarter? A. Yes.

Q. Were the properties gone over at each examination? A. Yes.

(Testimony of Charles H. Baker.)

Q. That is, I mean the securities that were in your hands? A. Yes.

Q. The title deeds, contracts and so forth?

A. Everything was examined very carefully.

Q. Were those examiners regular national bank examiners?

A. No, they were not; they were examiners of receivers, I think they were called.

Q. Have you occasion to know from anything that may have occurred in connection with this receivership, whether any asset that came into one of those trusts could be lost sight of in any way in these examinations or in these reports?

A. Impossible to lose sight of it.

Q. Why?

A. Well, they had—in the first place they had very skillful examiners, and then the habit of checking up was such that nothing could escape—

Q. Did you disclose to Mr. Frater—did you go over those assets with Mr. Frater in connection with your transferring to him the remaining assets of the bank; just answer that question yes or no.

A. No, I don't think I did, Mr. Hill did.

Q. Did you have a conversation—

Mr. BAUSMAN.—Do you know that Mr. Hill did, or is this your belief? [219—130]

A. I know that Mr. Hill did. It is just possible that I came in in a different way.

Q. (Mr. GROSSCUP.) Did you have any discussion with Mr. Frater after he took charge of the receivership, concerning these tide lands?

A. I do not think I did.

(Testimony of Charles H. Baker.)

Q. Any of it, I mean? A. No.

Q. Now, Mr. Baker, you were actively engaged in the power business from the spring of 1899 down to 1903, when your father died? A. Yes.

Q. When did you take up with Mr. Simpson the matter of acquiring the legal title or the written assignment of this contract No. 728 covering block 430?

A. I think it was in the spring of 1904.

Q. Let me ask you this question: Was or was not the duplicate contracts as numbered by the State land office, signed by the commissioner of public lands, a part of the physical assets of the trust and in possession of you as receiver? A. They were.

Q. Now, when a sale took place what was done with that paper which you call a contract with the State?

A. It was assigned and delivered.

Mr. BAUSMAN.—Delivered to whom?

A. To the purchaser.

Q. (Mr. GROSSCUP.) After that time was that paper a part of the securities or files in the office?

A. No, sir, it was not.

Q. What was put in its place? A. The money.

Q. Well, what was done with the money then?

A. The money was transmitted to Washington.

Q. And what evidence did you preserve in your office to balance your account for this paper?

A. The record of the items and the books and reports.

Q. Now, Mr. Baker, I will go to 1904; your father, you say, died in 1903, October 6, I think it was. [220—131]

Mr. BAUSMAN.—October, 1903.

(Testimony of Charles H. Baker.)

Mr. GROSSCUP.—And in 1904 you were expecting a partial distribution of your estate, were you?

A. Yes.

Q. Now, some letters have been introduced here to show that you were seeking a transfer of this contract to yourself; you heard the testimony of Mr. Reed, did you? A. Yes.

Q. Did Mr. Reed substantially state the facts in regard to that matter, or did he not?

A. I think he stated it correctly.

Q. From the time that you made this agreement with Mr. Simpson in the spring of 1899, a few days, as you expressed it, before the sale to Anderson, from that time on were you the equitable owner of contract No. 728 covering block 430? A. I was.

Q. It has been alleged in the complaint that Mr. Simpson was in bad health in 1904; is that a fact?

A. Yes, he was.

Q. Had you disposed of all of the claims that were against you at that time?

A. About all of them, yes.

Q. And what did you do with respect to getting a legal assignment of this contract?

A. Well, I had not any money to take it up, and I took it up with him on the basis of giving him my note.

Mr. BAUSMAN.—You are speaking of 1904 and 1905?

Mr. GROSSCUP.—1904.

A. (Continuing.) —and he agreed to do it.

Q. And then came the settlement with Mr. Reed, is that correct?

(Testimony of Charles H. Baker.)

A. He turned me over to Mr. Reed. Later he said Mr. Reed was managing his affairs and that he would settle it with me.

Q. And in connection with the settlement with Mr. Reed did you or did you not arrange to get the money that was required? A. I did later, yes.

Q. Did that cause some delay in consummating the transaction? [221—132]

A. Yes, considerable delay.

Q. Mr. Baker, after you took up the matter of getting an assignment of this contract No. 728 covering block 430, did you have any correspondence with the land office at Olympia respecting the harbor area in front of that block? A. Yes, I did.

Q. In connection with that correspondence I now show you a paper marked for identification—

Mr. BAUSMAN.—I have no objection to that.

(Document received in evidence and marked Defendants' Exhibit "A-9" and read to the Court as follows:)

Defendants' Exhibit "A-9" [Letter, Dated October 16, 1904, S. A. Calvert, Commissioner, to Charles H. Baker].

Department of Public Land,
Olympia, October 16, 1904.

Mr. Charles H. Baker,
Seattle, Wash.

Dear Sir:

Replying to your letter of the 14th will say that the harbor area fronting block 430 Seattle tide lands is

(Testimony of Charles H. Baker.)

already under lease to Mr. S. G. Simpson.

Yours truly,

S. A. CALVERT,
Commissioner.

Q. I show you a check dated August 10, 1905. To avoid multiplying exhibits I will state that this check under date of August 10, 1905, is on the Washington National Bank, Seattle, payable to Norwood W. Brockett, $659.51. Signed Charles H. Baker.

(Check received in evidence and marked Defendants' Exhibit "A–10.")

Q. For what purpose was that check given and used?

A. That was to pay the taxes on block 430 that were delinquent; it was given for that purpose.

Q. Some correspondence has been shown here between Norwood W. Brockett and the State Land Commissioner concerning the title to this block. Was Mr. Brockett acting for you in that connection?

A. Yes, he was.

Q. Was the fact that Mr. Brockett was your attorney in this [222—133] community, to your knowledge, well known? A. Yes, it was.

Q. The exhibits in this case show, Mr. Baker, that you directed that this title should be placed in the name of Algernon S. Norton of Suffern, New York. Explain why the title was put in his name.

A. Mr. Norton was my attorney in New York and I was arranging to go to China to explore power and railway enterprises there and to be absent for a couple of years or so, and it was put in his name so

(Testimony of Charles H. Baker.)

that he could manage the property for me during my absence.

Q. Subsequently this company was incorporated.

Mr. BAUSMAN.—Which company?

Mr. GROSSCUP.—This defendant company, the Seattle Water Front Realty Company—and this title turned in in payment of the stock. A record brought here by the deposition of Mr. Norton shows that two hundred and fifty shares of stock were transferred to you personally and that certain other shares of the stock to Mr. Norton and certain to other people, leaving approximately three-quarters of the stock in the name of Mr. Norton. Why was that stock left in the name of Norton?

A. It was left so that he could sell the stock and manage the company—giving him a majority of the voting control so that he could elect directors and manage it during my absence.

Q. Was it the purpose to sell this property from the time you acquired it? A. Yes, it was.

Q. In connection with this stock did you make a loan in New York, or in New York State?

A. Yes, sir, I did.

Q. From whom?

A. From the National Bank of Suffern, New York.

Q. Was your stock pledged as collateral to that loan? A. Yes, it was.

Q. In connection with that pledge, do you know whether the bank of Suffern made inquiry in the city of Seattle as to the value of this stock and your connection with the company?

(Testimony of Charles H. Baker.)

Mr. BAUSMAN.—I object to that as irrelevant, immaterial and incompetent.

The COURT.—He can answer.

A. Yes, they inquired of their correspondent, the Seattle National Bank here in Seattle. [223—134]

Q. (Mr. GROSSCUP.) Have you looked up your memorandum to see about the date of that transaction? A. I think it was in 1907.

Q. You have seen the cancelled note recently which reminds you of that? A. Yes.

Q. Mr. Baker, have you received for this property offers from real estate people in Seattle addressed to you personally?

A. McGraw & Kittinger made one offer for it.

Q. Was that addressed to you personally?

A. Yes.

Q. When was that?

A. That was when the railroad excitement came on in January, 1906, I think it was, the Union Pacific were buying terminals here then and had been doing so quietly, and when their operations were made public there was an immediate boom in tide lands, and this property and others rapidly increased in value.

Q. Mr. Baker, about the time that you were figuring on going to China or to the Orient, in December, 1904, I will ask you whether you received that letter (showing)? A. Yes, sir, I did.

(A letter was received in evidence and marked Defendants' Exhibit "A–11," and reads as follows:)

Defendants' Exhibit "A–11" [Letter, Dated December 16, 1904, Charles G. Dawes to Secretary of U. S. Legation, Tokio, Japan].

CENTRAL TRUST COMPANY OF ILLINOIS.
Chicago.

Office of the President. December 16, 1904.

Mr. Huntington Wilson,
Secretary of the United States Legation,
Tokio, Japan.

My dear Sir:

This will introduce Mr. Charles H. Baker, [224—135] formerly of Chicago and now a resident of Seattle, Washington.

Mr. Baker is a man of large business affairs and is responsible for the development of a large part of the electric power which the City of Seattle now enjoys. He is a man of standing and responsibility.

He is visiting Japan for a time and any courtesies shown him will be appreciated.

Respectfully,
CHARLES G. DAWES.

Q. Mr. Baker, in connection with your letter of May 9, 1904, to Mr. Mark Reed, you use this language: "I had a talk with Mr. Simpson in S. F. about the tide lands which he holds in trust for me. I asked him if he would take my note in settlement of the advances he has made, together with the interest accrued thereon. The first two or three payments I made myself." I will ask you to what payments these "first two or three payments" refer, in that letter.

(Testimony of Charles H. Baker.)

A. It refers to the first payment that Mr. Simpson made.

Q. The first payment that Simpson made?

A. I settled with Mr. Simpson on the note covering the payments, and this letter refers to that settlement.

Q. In other words, now, let us see if I understand you, in your settlements with Mr. Simpson in 1899 you reimbursed him for what he had reimbursed the trust for on the two payments, and the third payment which he had made was included in that settlement; is that correct? A. Yes.

Q. Did you, upon any occasion, in substance or effect, discuss with Mr. Simpson the subject as to why you wished him to carry this contract in his name after you made this purchase in the spring of 1899, other than you have told upon the witness-stand? A. No, I did not.

Q. Now, coming to a direct question, did you ever tell Mr. Simpson that you wished him to take this title because you were receiver of the bank?

A. No, I did not.

Q. This agreement which has been shown here, this settlement between you and your wife, and which is marked as Defendants' Exhibit "A-3," you identify that as the agreement which you made?

A. Yes.

Mr. GROSSCUP.—You can cross-examine. [225—136]

Cross-examination.

Q. (Mr. BAUSMAN.) Now, Mr. Baker, do you state while you were receiver of this bank in the

(Testimony of Charles H. Baker.)

spring of 1899 you, as you say, bought back block 430 from Mr. Simpson while you were still receiver—block 430 of Seattle tide lands in the spring of 1899, while you were still receiver, for just what he had expended on it; is that true?

A. That and interest, yes.

Q. What—and interest? A. Yes.

Q. And what was the amount which you gave him?

A. I think it was about four hundred dollars.

Q. About four hundred dollars—you have also testified that you thought that to be the value of block 430 at that time, have you not? A. Yes.

Q. And it is in evidence that you sold—it is also in evidence that at that very time you sold to what you call Piggott and Hofius your merely contested rights in the adjoining block 431 for one thousand dollars; is that so? A. Yes.

Q. Next, Mr. Baker, what did Mr. Simpson give you as evidence that he had thus transferred back to you while receiver a title in that land?

A. He did not give me anything.

Q. Did he give you a scrap of paper?

A. No, he did not.

Q. He continued to hold it exactly as he had held it since 1897, didn't he, as far as the public record is concerned? A. Yes.

Q. When Mr. Turner testified here, in effect, that Mr. Simpson had said that that land had been put in his name by you because you were receiver—put in his, Mr. Simpson's, name, by you because you were receiver of the Merchants' National Bank—when he said that you heard your counsel, Mr. Shank,

(Testimony of Charles H. Baker.)

inquire at once—inquire of the witness, Mr. Turner, whether Mr. Simpson was not an honorable man, didn't you? A. I did. [226—137]

Q. You now admit on the stand, don't you, that Mr. Simpson carried that confidentially in his name for you from 1899 to 1905, don't you? A. I do.

Q. Your counsel inquired of you the honorable character of either of you in respect to that transaction—well, passing that inquiry which, perhaps, you do not want to answer, I will ask you this, at that time you were overwhelmed with debts, were you not? A. I was.

Q. And one of them was the note held by this very bank of which you were receiver, against yourself, wasn't it? A. Yes.

Q. For ten thousand dollars and interest. Now, Mr. Baker, this suit was begun in February, 1912, or thereabouts, wasn't it?

Mr. GROSSCUP.—1913.

Mr. BAUSMAN.—I beg pardon; 1913.

Q. Your answer in this case was filed in July, 1913, or thereabouts, wasn't it?

A. I do not know when it was filed.

Q. Well, it was filed in the summer of 1913. Before you filed that answer you had frequent conferences with Mr. Grosscup, your counsel, who has been examining you here. A. Not on this matter.

Q. Have you not testified in your examination heretofore that you did have such conferences with him? A. I had some, yes.

Q. Then you wish to retract the statement which you made just a moment ago that you had no confer-

(Testimony of Charles H. Baker.)

ences with him on this matter.

A. I did not say that.

Mr. GROSSCUP.—He did not make that statement. You asked him whether he had frequent conferences.

Q. (Mr. BAUSMAN.) Then you had conferences with him on the matter of your answer in this case.

A. I was with Mr. Grosscup every day—

Q. Answer me—you had conferences with him?

A. Yes. [227—138]

Q. And before he filed that answer you sent him down to Washington City to examine the comptroller's files, didn't you? A. I did.

Q. And he went there, didn't he? A. He did.

Q. As far as you know, and you do know, don't you, that this answer of yours was filed after he had made such examinations and had had conferences with you. A. It was filed after that, yes.

Q. And you know that he got also an extension of time from me in which to make his answer; that is true? A. Yes.

Q. Now, then, when you made that answer, in July or thereabouts, 1913, you did not then know of the existence of a certain blue letter here, written on the railroad, did you? A. No, I did not.

Q. This letter which I refer to now is Plaintiff's Exhibit 12, and accordingly in your answer you stated certain things, you stated in your answer that Mr. Simpson never had held that in trust for you, didn't you?

A. I didn't state anything in the answer. I never saw the answer until—

(Testimony of Charles H. Baker.)

Q. Well, then, your counsel stated it for you, after conferences and after an examination of certain exhibits, that Mr. Simpson never had held that in trust for you—you know that, don't you?

A. I think that is what the answer stated.

Q. And that answer is not true, is it?

A. No, it is not.

Q. As a matter of fact, you now admit on the stand that he had held it for six years in trust for you at least, don't you? A. Yes.

Q. And you wish to put upon your counsel the burden of making a misstatement so gross as that?

A. He can put it on himself—I did not know anything about the complaint.

Q. I am speaking about the answer now—in this same answer you said that this asset, block 430, Seattle tide land, was a desperate asset—that is in that answer, isn't it? [228—139]

A. I don't remember. I don't think it is.

Q. Suppose it to be in it, and the Court can see where it is—that is untrue, isn't it?

A. Well, it would be a very slow asset.

Q. I am asking you a question—answer it, please.

A. Repeat the question again.

(Question repeated to the witness.)

A. Yes, that was a desperate asset.

Q. You call it a desperate asset, notwithstanding your books listed it as "additional assets good."

A. Those assets—

Q. (Interrupting.) Answer me that. You still say that, do you?

A. I am going to answer the question and I am go-

(Testimony of Charles H. Baker.)

ing to answer it in my own way.

Mr. BAUSMAN.—That may be as the Court determines, Mr. Baker. I think I have the right to an answer. You still say that this is a desperate asset, notwithstanding your books, as put in evidence here, list it as "Additional assets good"?

The COURT.—Answer that yes or no. A. Yes.

The COURT.—And then you may make your explanation.

Mr. BAUSMAN.—Now make the explanation.

A. The name of the asset is simply a classification. It means nothing. It is the classification that the asset took when it was first classified, and I assumed that the asset was good at least for the money that was in it.

Q. When you take on additional assets, meaning assets not acquired by the bank at the time of its failure, do you take them on unless they are good?

A. I would take on a dead horse if it came as an asset of the bank.

Q. And then you would list it as "Additional assets good."

A. If I put good money in it at the first it certainly would be good.

Q. Then you would not put good money into it unless you thought it good, would you?

A. It was the putting of the good money in it that made the asset. [229—140]

Q. Certainly, and I ask you if you would put good money into a dead horse?

A. I have done it, but not on this occasion.

Q. Haven't you put the money into this tide land

(Testimony of Charles H. Baker.)

because, as you said in your letter to the comptroller in January, 1897: "This is a valuable asset of the trust"? A. Yes.

Q. Then it was listed as "additional assets good," wasn't it? A. It was.

Q. Now, further pursuing your idea that notwithstanding these things it was what you call a desperate asset, though you sold this to your friend Simpson in 1897, you kept some other assets called tide lands, didn't you? A. Yes.

Q. And you afterward sold those, in 1899, at a very great advance over what those in 1897 yielded?

A. A considerable advance.

Q. Then, in view of this very great increase in the value in those two years, and in view of your letter to the comptroller calling it a valuable asset of the estate, will you now say that your answer to this complaint, in reference to your rights in block 430, when you call it a desperate asset, was true?

A. When it first came to the comptroller it was a valuable asset.

Q. It was what?

A. It was a valuable asset. I would not have advised it otherwise.

Q. It came into your custody at the time you wrote that letter saying that it was a valuable asset in January, 1897, didn't it? A. Yes.

Q. And then came the Klondike excitement in July, 1897, didn't it? A. Yes.

Q. Then you wrote a letter in October, 1897, to the comptroller after the Klondike excitement, which letter you have heard read in evidence here, saying

(Testimony of Charles H. Baker.)

that things were going up generally and that there was going to be prosperity? A. Yes.

Q. And it was after that that you sold it to your friend [230—141] Simpson? A. It was.

Q. Are you still satisfied that your answer in this case stating that this was a desperate asset, is an honest answer?

A. Yes, because the years proved it to be.

Q. What?

A. The years that we held it during which it was utterly unsalable proved it to be.

Q. Yet you kept the other assets of tide lands and within eighteen months you sold them for thousands of dollars? A. Yes.

Q. And in 1899 when you bought back block 430 from Mr. Simpson, while you were still receiver, you paid him for this large block of twelve acres only three hundred dollars and interest, and you sold the adjoining land which you were in litigation about, your mere contest interest in it, for a thousand dollars at least, didn't you? A. Yes.

Q. And they were simultaneous transactions, practically? A. About, yes.

Q. You and Mr. Simpson and Mr. Anderson were very intimate, were you not?

A. Very good friends.

Q. You had offices together down in the Union Block? A. No.

Q. You had offices together, didn't you?

A. No.

Q. I will ask you now whether that statement in your answer in which you state that you bought back

(Testimony of Charles H. Baker.)

this property from S. G. Simpson, meaning block 430, in the open market, is a true statement?

A. I didn't say I bought it back in the open market.

Q. That is what *you* answer says in this case. Do you say now that you got it in the open market—do you say that now, that you got it back from Mr. Simpson in the open market?

A. No, it was not in the open market.

Q. Then if your answer before it was amended on the very date of this trial, yesterday—if your answer then stated [231—142] that you bought it back in the open market, that is not true, is it?

A. No, that is not true.

Q. And if your answer says—and I will read from the answer which says before it was amended the day before yesterday—at the close of paragraph four, "Denies that this defendant as receiver or in any other capacity held the contract for the purchase of said tide land for his own use and benefit after the sale to Sol G. Simpson until after he repurchased said block from Sol G. Simpson in the open market after the termination of his receivership." I am reading the answer now before your wise counsel here amended it a day or two ago—your original answer says it was bought back in the open market; that is not true? A. No.

Q. And that original answer says it was bought back long after the expiration of the receivership, doesn't it? A. I believe it does.

Q. And that is not true, either, is it? A. No.

Q. That answer was drawn before you knew, I be-

(Testimony of Charles H. Baker.)

lieve you said, of the existence of this railroad letter, exhibit "12." A. Yes, it was.

Q. Continuing, Mr. Baker, on the matter of your answer: your answer in two or three places denies that you ever settled with Mr. Simpson by any reimbursement for any advances, you know that, don't you,—you know your answer says that, don't you?

A. I think it does.

Q. Now, Mr. Baker, you know that it does, because in the previous examination you had to admit that before, didn't you?

A. I wish you would read to me what it says. I never read the answer but once—I just casually saw it this morning.

Q. In paragraph five it says, "This defendant further denies that he from time to time or at all advanced to said Simpson or reimbursed the said Simpson for sums paid by him to the State of Washington on account of the purchase price of said block"; is that true or is it not true?

A. No, that is not right.

Q. It is not true. Now, Mr. Baker, according to your stories,—according to your testimony both as to your settlement with Mr. Simpson in 1899 and your settlement in 1905, you never dealt with him on any other basis [232—143] than reimbursement for advances, did you?

A. Well, the final consummation of the arrangement was an upset price which included the disbursement.

Q. Now, Mr. Baker, you stated that in the spring of 1899 you settled with Mr. Simpson on the score

(Testimony of Charles H. Baker.)

of the advances he had made, didn't you?

A. Yes.

Q. And then it is not true in your answer when you say, "This defendant further denies that he from time to time or at all advanced to the said Simpson or reimbursed the said Simpson for sums paid by him to the State of Washington on account of the purchase price of said block," that is not true then?

A. That is not true.

Q. Then when you come to 1905 you reimbursed him then for advances on block 430, didn't you?

A. I paid this price which included all his advances and taxes and interests.

Q. You settled with him on the score of advances made, didn't you?

A. And including the tide-land deeds.

Q. But that has reference here to "said block" in your answer, and yet you deny that you ever reimbursed him for it, is that true or not true, in 1905?

A. It is not true.

Q. There again you were ignorant of this blue letter written on the railroad when you told your counsel to file that answer? A. Yes.

Q. In the letter of May 9, 1904, written on the railroad, you say, addressing Mr. Reed about Mr. Simpson: "I asked him if he would take my note in settlement of advances he has made together with the interest accrued thereon"; in the light of that letter you wish to say that that statement made in your answer is untrue, both as to 1899 and as to 1905, don't you? A. Yes, sir, it is untrue.

Q. Is it possible that you had hopes at that time,

(Testimony of Charles H. Baker.)

Mr. Baker, that this letter would never be discovered? A. No.

Q. Mr. Baker—

Mr. GROSSCUP.—Just let him answer it. [233—144]

Mr. BAUSMAN.—He has answered it.

Q. Mr. Baker, after this letter was discovered the Seattle Water Front Realty Company had filed an amended answer, hadn't it? A. I don't know.

Q. You were the largest stockholder in it—do you know whether it had filed an amended answer?

A. I know it did.

Q. It had filed an amended answer after the revelations in this letter?

A. I don't know when it was filed.

Q. After the revelations contained in this letter and several simultaneous documents, it was found necessary to amend the answer, wasn't it—just state that—you know it, don't you?

A. The answer was amended, yes.

Q. That is known as the Seattle Water Front Realty Company? A. Yes.

Q. Did *you* counsel have a conversation with you as to whether you should amend your personal answer in the case after that revelation? A. Yes.

Q. And they decided that they would not file a new amended answer for you, didn't they?

A. No, they said they would make the amendments when the case was called.

Q. But they said though they did not wish to file a formal written answer for you anyway, didn't they? A. No, they did not say that.

(Testimony of Charles H. Baker.)

Q. But such circumstances came to pass that they considered it imprudent to reduce your statements again to definite form?

A. Mr. Grosscup told me from the beginning that—

Q. Never mind about the beginning, just answer that question. A. Will you repeat the question?

(Question repeated to witness.)

Mr. BAUSMAN.—That is the question that I want you to answer. **[234—145]**

A. Well, they said they would have to make the amendments when the case was called.

Q. Now, they made no amendments to this answer other than those that were made by interlineation here in court the day before yesterday at the opening of the trial, that is true, isn't it?

A. I think so.

Q. Now, then, you sold this property to Mr. Simpson in 1897, for less than you had paid the State of Washington, didn't you? A. Yes.

Q. And when you bought it back from Mr. Simpson, as you call it, in the spring of 1899, March, I believe, was the month, you say you bought it back for what he had advanced on the property, is that correct? A. Yes.

Q. Did you reimburse the trust for the omitted money?

A. I did not know there was an omission until I was here last fall.

Q. Now, Mr. Baker, the first letter which you addressed the Comptroller of the Currency in regard to this property was, was it not, this paper which

(Testimony of Charles H. Baker.)

I now hand you marked Plaintiff's Exhibit No. 3 (showing)? A. Yes.

Q. Now, in this Plaintiff's Exhibit No. 3 you use the following language—which was read.

You meant to ratify the contracts, did you, Mr. Baker— A. Yes.

Q. Now, then, Mr. Baker, the next communication you had with the comptroller's office was in your general report of November 30, after you had sold to Mr. Sol G. Simpson. A. I think so.

Q. Now, will you please show the Court in what language, where and in what manner, you refer to block 430 in that (handing report to witness).

A. This is a general—

Q. (Interrupting.) I beg your pardon, but the paper I now show you, in order to identify the reference, is Plaintiff's Exhibit No. 9, being your quarterly report of November 30th.

A. This is the regular form or report.

Q. Yes. Now, will you please explain to the Court, pointing [235—146] out where you refer to this block 430, or in what language you refer to it.

A. There is not any reference to block 430, or to any other asset by name. This report is a report of aggregates, and is accompanied by schedules.

Q. Now, find out in that report where you made a reference to this transaction.

A. Well, I do not see any reference in it.

Q. Mr. Baker, for your information I will state that this transaction is referred to in this exhibit No. 9, and now that you are very familiar with this case and have had plenty of time, I will ask you to

(Testimony of Charles H. Baker.)

point out to this Court where that reference is contained, in order that the Court can ascertain how quickly an examiner in Washington could probably discover it. A. "Schedule E annexed"—

Q. Read it to the Court.

A. "Schedule E, fractional quarter ending November 30, 1897. Collections of other assets acquired since suspension by the receiver of the Merchants' National Bank. Date. Segregation of assets, good, doubtful, worthless. Amount to date of last report, good $22,548.82; doubtful $8,354.35. Sold to S. C. Simpson tide-land contracts 727 and 728 $315.20."

Q. I will ask you whether that speaks of block 430 there? A. No, it does not.

Q. Will you please point out to the Court, if you can now, any place in which you have reported to the comptroller of the currency the sale of block 430 by name? A. That report shows there.

Q. That is the only one you know of, is it?

A. I think there are others.

Q. What others—you and your counsel have conferred—what others?

A. I think one went in evidence yesterday.

Q. What one is it? A. I don't remember.

Q. Now, then, in this one you do not refer to block 430, you say, and I am asking you the question where block 430 is referred to in any report made by you to the comptroller, other than under the designation of "Contract 728."

A. That is the proper designation for that property. [236—147]

Q. I did not ask you that question; your counsel

(Testimony of Charles H. Baker.)

may ask you that; I am asking you this question please, can you tell me any other report or written communication by you to the comptroller referring to block 430 by name?

A. I do not know of any other.

Q. This is the final reference you ever made in any report either to contract No. 728 or to block 430, isn't it—that closed the transaction, didn't it?

A. Yes, sir.

Q. Now, Mr. Baker, at the time you were appointed receiver of this bank a great protest went up from the people of Seattle about your appointment? A. Yes.

Q. Some people who might have thought you eligible to the postmastership which the Department refused to give you, probably did not consider you to be a proper person to be receiver of a bank to which you were indebted; isn't that true?

A. Yes.

Q. You owed your appointment to your wealthy father living in Chicago, didn't you? A. Partly.

Q. He was a great friend of Mr. Eckels, the comptroller of the currency, was he not? A. Yes.

Q. People said you ought to pay this ten thousand dollar note, didn't they, which you owed the Merchants' National Bank, didn't they—now I am asking you what you think about it and what people said in their protest?

A. That was one of the complaints, that I had a note in the bank that ought to be paid.

Q. You were appointed in what year?

A. In 1895.

(Testimony of Charles H. Baker.)

Q. Two long years had passed and you had done nothing in respect to the payment of that note, had you—it is now 1897, we will say?

A. That note was paid before I went in.

Q. Now, Mr. Baker, it has been admitted by you and it was listed as one of the assets of this estate at the time you became receiver; I am not asking you for your legal conclusion, but I am asking you whether *it* point of fact this was not a listed asset of the Merchants' National Bank at the time of your receivership? [237—148]

A. I think it was a charged-off item.

Q. A charged-off item means an item which is still an asset, but just regarded as worthless, is that it? A. Yes.

Q. It was then, at the time of your appointment, an asset of the bank? A. It was.

The witness testified that about November 10, 1897, he received a written request from Comptroller Eckels that he submit to a Court, through lawyers not connected with the trust, a petition in respect to his indebtedness on the $10,000.00 note, the creditors to be represented *contra;* but that he never took any action upon this request. Also that the Rainier Power & Railway Company went into the hands of a receiver and that no dividend was ever declared to its creditors, but his collateral securities were sold by the bank and that he demanded an accounting from them. [238—149]

Q. Now, Mr. Baker, you know that is a matter that Mr. Wing investigated and reported on adversely to you, didn't he?

(Testimony of Charles H. Baker.)

A. I know that he reported adversely.

Q. And compelled you to restore that note to the listed assets of the trust, didn't he—didn't he now?

A. I do not have any recollection of that note going out of the bank, and you know it.

Q. And what?

A. And you know that I have no recollection of it.

Q. I do not think that is a proper answer for you to make, and I will read you something in a minute—I will ask you whether on December 17th, 1898 Mr. Wing did not examine your affairs?

A. He did about that time.

Q. And whether he did not say that you sent that note to Wells, Fargo & Company along with some bonds which you have sold.

A. I don't know what he said.

Q. Will you say that he did not say that?

A. I don't think I ever knew what he said.

Q. Did you have conversations with Mr. Wing about this note? A. Yes.

Q. He told you that you owed that note, didn't he?

A. I don't think Mr. Wing made any conclusions to me—he made those to the comptroller and I don't know what they were.

Q. You know that Mr. E. W. Andrews, the president of the Seattle National Bank of this city sent that note back to you, that you claimed to Wing that you received it only back in your individual capacity, and did not relist it as an asset of the trust, isn't that so?

A. I don't remember that at all. [239—149a]

(Testimony of Charles H. Baker.)

Q. And then the department made you restore that note, didn't they?

A. I don't remember it. I don't know anything about it. Whatever the record says there I will stand by. The note was there when I left.

Q. Now, Mr. Baker, the decision of the department was, at the close of '98, you not having tried to have this matter adjudicated fairly under the suggestion of Mr. Eckels, the decision of the department was that that note was an asset of the trust, wasn't it? A. Yes.

Q. It had always been, in contemplation of the department, an asset of the trust, hadn't it?

A. Yes.

Q. Then, Mr. Baker, you found that you had to leave this receivership didn't you?

A. I calculated that it was inconsistent for me to be receiver and owe the bank, according to the determination of the comptroller.

Q. You knew that the department had made up its mind that you would do nothing with that note except to argue about it, didn't you?

A. Not until the final decision.

Q. And then when you gave your resignation on March 13, 1899—I want to refer to that letter.

The COURT.—I remember the substance of the letter.

Mr. BAUSMAN.—There is certain language in it that I want to call attention to—I don't seem to be able to find it right now.

Q. Assuming the language in it to begin—you addressed the comptroller in it under date of March

(Testimony of Charles H. Baker.)

13, 1899, and you say, "Now, that by your decision an asset of the trust"—or "my note has become an asset of the trust" I do so and so—you used that language, didn't you?

A. Just about that language.

Q. Assuming that that is the exact language of your letter of resignation, I want to ask you—here is the letter, it is Exhibit "H," under date of March 13, 1899, you address the Comptroller Dawes and you say, "Dear Sir: I respectfully call your attention to your recent decision whereby a note signed by me prior to the suspension of the bank now becomes an asset of the trust." That is the language you used?

A. Yes.

Q. Will you state, Mr. Baker, why you said, "It now becomes an asset of the trust," when you admitted it was an asset of the trust from the beginning? [240—150]

A. It was an asset from the beginning that was contested.

Q. And you had not submitted it to a court of jurisdiction under Mr. Eckels' suggestion, but you had kept on your way for four years, or thereabouts, claiming that it had no rights, is that so?

A. Yes.

Q. And you thought in resigning that you could save your face by a very delicately written letter showing a high sense of honor and reciting that this had now become an asset of the trust?

A. I had no such thought.

Q. Did you then, since this was going to charge you by this decision with ten thousand dollars of

(Testimony of Charles H. Baker.)

liability, did you then claim an adjudication upon that note and have it submitted to see whether this was right that the department should so decide against you? A. When I resigned, you mean?

Q. When the decision reached you of the department rather than a decision of a court of justice.

A. No, sir, I resigned.

Q. And you did not claim a legal adjudication under the permission given you by Mr. Eckels, did you? A. No.

Q. Now, then, you quit the trust owing it ten thousand dollars so far as you had not attempted to clear yourself from it in any court, had you?

A. So far as any adjudicated claim was concerned.

Q. You had the right to bring suit for cancellation of that note, did you do so? A. No.

Q. Mr. Baker, you have vainly sought—or you have sought to impress this Court with the idea that Judge Stratton's opinion—a very excellent man—was your safeguard, whom you have said was in the employment of your trust and receiving a salary from it, that is true, is it not? A. Yes.

Q. Did you tell the department in a certain letter of October, 1897 that the attorney for the bank, Mr. Ira Bronson, took a different position—did you tell them that? A. No, I did not.

Q. Mr. Bronson is a lawyer of ability and standing, was he not? A. Yes. [241—151]

Q. Did you tell them also that even if your legal position was correct and that the bank had converted the collateral, that the collateral was worthless and there could not be any damages ensuing to

(Testimony of Charles H. Baker.)

you; you did not tell them that, did you?

A. The collateral was not worthless.

Q. How is that?

A. The collateral was not worthless.

Q. Then, Mr. Baker, as I had myself the reorganization of some of these properties, possibly I can refresh your memory. The notes you testified about I believe as the collateral notes to your notes, were those of D. T. Denny? A. Yes.

Q. He became absolutely hopelessly insolvent, didn't he? A. He did.

Q. The other collateral which went in, was the bonds of the Rainier Power & Railway Company, which was a D. T. Denny corporation?

A. Yes, sir.

Q. And that went into the hands of a receiver and became absolutely worthless, didn't it?

A. It did not and you know it.

Q. Passing that now, Mr. Baker, when did you get out of debt?

A. Oh, I got out of debt in 1905, completely out of debt in 1905.

Q. About what time, may I ask you?

A. Well, about the time I settled up with Mr. Reed.

Q. Just a little before that you got out of debt—do you remember that you opened bank accounts in Seattle about that time, so that I assume that in the summer of 1905 you were clear of debt? A. Yes.

Q. Then in 1905, being cleared of debt, except that you had nothing paid on this note to the bank, you never paid that, did you?

(Testimony of Charles H. Baker.)

A. That note was sold by Mr. Frater and Mr. Hardin, or my father I think bought it in.

Q. Your ten thousand dollar note then was sold as a worthless asset of the bank and your father bought it in?

A. No, it was sold to somebody out of the bank and Mr. Hardin bought it from him later on. [242—152]

Q. This Hardin is your lawyer? A. Yes.

Q. He lived in Seattle up to 1905 and then he followed you to New York, in a sense? A. Yes.

Q. So that is the way you discharged the note, was it not now?

The COURT.—The Court understands that.

Q. (Mr. BAUSMAN.) You were then free of debt in 1905?

A. Yes.

Q. You are free of debt I believe you stated; is that correct? A. Yes.

Q. And then you took the property out of Mr. Simpson's name, didn't you? A. Yes.

Q. But you did not take it to Charles H. Baker, did you? A. No. [243—153]

Q. Had it occurred to you that possibly a transfer of twelve acres of tide lands to Charles H. Baker might attract attention in Seattle and somebody see that you had suddenly gotten in position to own a large tract of land, in the year 1905?

A. No.

Q. But you did not then take it into your name, did you? A. No, I did not.

Q. You took it in the name of Algernon S. Norton,

(Testimony of Charles H. Baker.)

didn't you? A. Yes.

Q. He was your lawyer in New York, was he not?

A. Yes.

Q. He gave, I believe he states, no consideration for it so far as he was concerned, he held it only for you, didn't he? A. Yes.

Q. And then you had this Mr. Norton give you a declaration of trust, didn't you?

A. No, I didn't ask him to.

Q. He just gave it to you—then you were not satisfied with that, but you got a second declaration of trust from him in 1906, didn't you?

A. There were two declarations of trust—I do not know why there were two.

Q. And neither of them were recorded?

A. No.

Q. Then in 1907 you transferred this property from Norton to the Seattle Water Front Realty Company? A. Yes.

Q. I will retrace my steps for one moment. You have stated that one of the reasons for keeping the title in the name of Mr. Norton was that you thought you might go to China; is that true? A. Yes.

Q. I will recall your mind to the testimony given by Mr. Norton in his deposition, in which being asked to explain why you did not keep it in your name and give him a power of attorney, he says he did not know any reason—now, do you know any reason? A. No.

Q. And he states further that although he kept it in his name for facility of selling, yet he would not

(Testimony of Charles H. Baker.)

be allowed to make a sale, or words to that effect, unless he reported it to you even if you were in China; that is true too, isn't it—you heard that testimony yesterday?

A. I don't know whether he referred to my being in China or not.

Q. But any sale that he made he must report to you? A. Yes.

Q. So that he would have no greater powers under the deed to sell it than he would have had under a power of attorney, so far as you were concerned, you would have to ratify it, is that not so? A. Yes.

Q. Then, Mr. Baker, the next thing you do is in 1907, after it had been held in trust for you by Mr. Norton two years, you caused [244—153a] to be organized the Seattle Water Front Realty Company, didn't you? A. Yes.

Q. You have heard Mr. Norton's testimony in which he says he got five per cent ultimately out of that in various ways, which he described, and that the rest became yours, you know that, don't you?

A. Yes.

Q. And though you owned ninety-five per cent of the stock of that corporation, you never became a director from that day to this, did you? A. No.

Q. And from the organization of that company in Seattle—it was in Seattle, was it not? A. Yes.

Q. From the organization of that company in Seattle in 1907 you corroborate Mr. Norton, do you not, that the books and records of the company were all taken over to New York and kept there?

(Testimony of Charles H. Baker.)

A. Yes.

Q. You were aware of that law, perhaps, of the State of Washington, which requires a company to file in a public office a list of its directors—you know that, don't you? A. No.

Q. You had been director of a number of companies in Seattle which your father owned, hadn't you?

A. Yes.

Q. And you do not know of that law?

A. No, I do not recall it.

Q. At any rate you never became a director in that company? A. No, I never did.

Q. That company's books and records remained in New York, and you lived in New York, didn't you?

A. Well, I had New York for headquarters, but I was mostly in the south, Nicaragua.

Q. Well, it takes only a day to go to the south, down to Nashville and such places. A. Yes, sir.

Q. New York was your home and you were there nearly all the time? A. No.

Q. You were there most of the time, were you not?

A. Probably half the time.

Q. And your present home is in New York, or in the suburbs of New York, is it not? A. Yes.

Q. At various times the name of Mr. Thomas B. Hardin has been mentioned here; he was one of your counsel, was he not? A. He was.

Q. It appears by some of the exhibits that he is connected with this business, or had something to do with the closing of the Simpson transaction, is that true?

(Testimony of Charles H. Baker.)

A. No, I don't think he had anything to do with the closing of it.

Q. He knew of your relations with Simpson, did he not? A. Yes.

Q. He was your confidential attorney, was he not?

A. Yes.

Q. Have you asked for his deposition to be taken in this case? A. No.

Q. Mr. Meacham is referred to by Mr. Norton here as the gentleman who had a continual correspondence with Mr. Norton; have you attempted to subpoena Mr. Meacham?

A. I have not. He was expected to be here as a witness.

Q. When did you see him last?

A. Oh, six months ago. [244—153b]

Q. Didn't you write to Mr. Brockett and tell him not to divulge any information to us? A. No.

Q. Never wrote him any letter of that kind?

A. I don't think so.

Q. Will you swear to that? A. Yes.

Q. This Mr. Brockett is the man whom it was stated here by you, closed the transaction with Mr. Simpson, is that correct? A. Yes.

Q. Certain papers were put in here showing Mr. Brockett's correspondence with the state land office, can you point out anything in those exhibits where he mentions the name of Charles H. Baker?

A. I never saw the exhibits until this morning—in fact I have not seen them yet.

Mr. BAUSMAN.—Will counsel admit that the

(Testimony of Charles H. Baker.)

name of Charles H. Baker does not appear in those exhibits which you filed as letters from Mr. Brockett to the state land office?

The COURT.—The exhibits will show for themselves.

Q. (Mr. BAUSMAN.) Assuming that the letters show that Mr. Norton's and Mr. Simpson's names are mentioned in those letters of Mr. Brockett, I will ask you finally and no longer, whether you do not know as a matter of fact, from consultation with your counsel, that your name, Charles H. Baker, is not mentioned by him to the land office in that correspondence. A. I don't think it is.

Q. Have you subpoenaed Mr. Brockett to testify here to-day? A. No.

Q. You know he is in this city, don't you?

A. No, I do not.

Q. You are willing if he is out of town, are you not? A. Yes.

Q. Now, Mr. Baker, by the way, he was one of your confidential lawyers? A. Yes.

Q. You did not, between 1897 and 1905 carry property in your name at all, did you?

A. No, I did not.

Q. You put things out of your name sometimes, didn't you? A. Yes.

Q. Mr. Baker, about this Union Savings & Trust Company stock, which is the only block of stock of any moment which has passed out of your hands; that does not belong to the Union Savings & Trust Company, does it? A. No, it does not.

(Testimony of Charles H. Baker.)

Q. Then if your answer stated here that the Union Savings & Trust Company of Seattle were the owners of that stock, that answer was untrue, was it not?

A. From a technical sense, yes; it belongs to Mrs. Baker and they hold it for her.

Q. Your divorced wife? A. Yes.

Q. And there are other collaterals there, are there not?

A. There is no collaterals there, there are other securities.

Q. You have secured her in various ways besides that, have you not? A. Yes.

Q. You are a wealthy man, are you not?

A. I am fairly well fixed.

Q. You inherited a considerable sum of money from your father in 1904 or 1905; he died in 1903, and about 1905 you became, from time to time, the recipient of large dividends from his estate, did you not? [246—153c] A. Yes.

Q. And you are to-day well off? A. Yes.

Q. Referring to Block 430, you got the contract to that land from the State of Washington in January, 1897, didn't you? A. Yes, sir.

Q. There was no litigation hanging over that in 1897? A. No.

Q. Now, Mr. Baker, you have spoken something about Mr. Simpson and his interest in those companies which you organized; you said something about that? A. Yes.

Q. They were the companies which belonged to your father, William T. Baker, of Chicago, were they

(Testimony of Charles H. Baker.)

not—I do not ask you to admit anything against any present contention of yours, but technically that is true? A. Technically that is true.

Q. I do not mean to have you state anything against your interests—but at one time they were known as the William T. Baker properties, were they not? A. Yes.

Q. Now, then, Sol G. Simpson never held more than one share of stock in any of those companies, did he? A. No.

Q. Either in the beginning or at any time afterwards, did he?

A. No. He held one qualifying share." [247—153d]

The witness then stated that he took the title in the name of Algeron S. Norton, who was then his attorney, and in 1907 the property was transferred to the Seattle Water Front Realty Company. The witness testified that between 1897 and 1905 he did not carry any property in his own name. The witness testified that the sale to W. D. Hofius & Company was made through A. H. Anderson. The witness then identified a receipt under date of March 14, 1899, which was admitted in evidence and marked Plaintiff's Exhibit 23, and which reads as follows: [248—153e]

Plaintiff's Exhibit 23 [Receipt, Dated March 14, 1899, Chas. H. Baker to A. H. Anderson].

SNOQUALMIE FALLS POWER COMPANY.

Chas. H. Baker, President.
Thos. T. Johnston, Chief Engineer.
J. J. Reynolds, Superintendent.

Primary Station—Snoqualmie Falls.
Central Distributing Station—Seattle.
Substations—Renton and Gilman.

Offices:
1009 Security Building,
Chicago.
Washington Building,
Seattle.

Seattle, Wash. Mch. 14, 1899.

$1000.00

Recd. of A. H. Anderson $1*00* in consideration of an option hereby given to him to purchase on or before Mch. 15th, 1899—for $1000 cash the interest of this trust in Block 431 of Seattle Tide lands, subject to the contests upon same now pending, and further subject to the approval of the Comptroller of Currency. The receiver will prosecute to a conclusion the present actions of contest now pending.

CHAS. H. BAKER,
Receiver.

(Indorsed on back:)

I hereby assign my interest in the within option to A. H. ANDERSON.

Recd. $1000.00 from W. D. Hofius & Co. as per

(Testimony of Charles H. Baker.)

within option, in accordance with the conditions thereof.

C. H. BAKER,
Rec.

Mch. 15th. [249—154]

The witness stated that he forwarded letter of resignation to comptroller March 13, 1899, and that notwithstanding this he took up a transaction in remaining tide lands by letter of March 22, 1899, being Plaintiff's Exhibit 24; that this transaction, known as the Pigott and Hofius deal, was conducted by Mr. William Pigott, whom he knew very well and whom he met quite frequently. That he gave the option, Plaintiff's Exhibit 23, to Anderson on March 14. That he presumed Anderson was going to make a profit, and that Anderson was his intimate personal friend; that he himself executed the final papers before surrendering the trust to Judge Frater; that he himself as receiver actually received the money involved.

The witness then testified that if Anderson sold the property to Hofius & Company for $1750, that Anderson made as commission $750. The witness then testified that he had been accused of selling certain bonds to Anderson at a grossly inadequate price, and that an inspector came and investigated the whole matter. The witness testified that this $1000 sale applied to the contested right in block 431. That blocks 432, 441, 443 and 444 were sold to Hofius & Company [250—154a] for $2000. That these sales were likewise made through Anderson. That he did not know that Anderson had made anything on these

(Testimony of Charles H. Baker.)

sales, but had learned two or three days before the trial of this case that he had made $3000. The witness testified that the reason he pushed through these sales just prior to his leaving the receivership was because he wanted the credit for them in his report, and that he did not know anything about any profit that Anderson was making.

There was then received in evidence a letter from Charles H. Baker to Charles G. Dawes, Comptroller of the Currency, bearing date March 22, 1899, marked Plaintiff's Exhibit 24, and reading as follows:

Plaintiff's Exhibit 24 [Letter, Dated March 22, 1899, Chas. H. Baker to Comptroller of Currency].

No. 2985.

THE MERCHANTS' NATIONAL BANK.
CHAS. H. BAKER,
Receiver.

Office of Comptroller
Mar. 27, 1899,
of Currency.

Seattle, Wash., March 22nd, 1899.

Hon. Chas. G. Dawes,
Comptroller of Currency,
Washington, D. C.

Answered
Mar. 27, 1899.
Insol. Bks.

Dear Sir:—

Under a statute of the State the owner of upland real estate is entitled to purchase from the State under a ten-year contract certain contiguous tide land such as may be allotted by the State tide land commission. Under this right of upland ownership the trust has made contracts for the purchase of cer-

tain tide lands abutting at West Seattle and has made certain payments thereon with the exception of block 431, which has been in contest with other claimants. I have sold, subject to your approval, the trust's interest in block 431 for $1000 cash. No payments of course have been made to the State as no contract for this has been issued. This is therefore an additional asset and when your Mr. Wing was here no value was set upon it. The other contracts I have sold subject to your approval for $2000 cash. Certain payments have been made on them here below set forth, so you will observe that the trust [251—155] makes a good profit on this transaction. I have not held these properties at any higher figure than the trust's payments upon them, but there has been for several days some speculative interest in the property in question and there were three parties after it all about the same time. I do not know what the basis of the speculation is, but I submit these offers as the best that I could do, which I think highly satisfactory to the interests of the trust. The three contracts proposed to sell additional to the one hereinabove set forth are as follows:

Block 432, paid thereon	$234.76	4 annual payments.
Block 441, paid thereon	203.77	" " "
Block 442, paid thereon	191.63	" " "
Total	$630.16	

Sale price, $2000.

Net profit to the trust, $1369.84.

$1000 has been paid in escrow by W. D. Hofius & Co., with whom the transaction is made.

Yours respectfully,

CHAS. H. BAKER,

Receiver.

The above list should include the following also:

Block 443 paid thereon 76.05

" 444 " " 11.89

87.94

There was then received in evidence a letter from Charles G. Dawes, Comptroller of the Currency, to Charles H. Baker, bearing date March 28, 1899, and marked Plaintiff's Exhibit 25, and which reads as follows:

Plaintiff's Exhibit 25 [Letter, Dated March 28, 1899, Comptroller of Currency to Chas. H. Baker].

L.

B. F. B.

TREASURY DEPARTMENT,

Washington.

Office of

Comptroller of the Currency.

Address reply to

Comptroller of the Currency.

March 28, 1899.

Mr. Chas. H. Baker,

Receiver, Merchants' Nat. Bank,

Seattle, Wash.

Sir:—

I am in receipt of your letter of the 22nd instant,

in which you state that under the Statutes of the State of Washington, the owner of upland real estate is entitled to purchase from the State under a ten year contract certain contiguous tide land such as may be allotted by the State Tide Land Commission; that under this right of upland ownership the trust has made contracts for the purchase of certain tide lands abutting at West Seattle and has made certain payments thereon with the exception of block 431, which has been in contest with other [252—156] claimants, and that no payments have been to the state as no contract for this land has been issued, and therefore it is an additional asset upon which you have previously placed no value. You state that you have sold the other contracts, subject to the approval of the Comptroller, for $2,000 cash, and that certain payments have been made upon them as shown in your letter. It is noted that these offers are the best you could obtain, and you regard them as "highly satisfactory to the interests of the trust." The three contracts proposed to be sold in addition to No. 431 are stated by you as follows:

Block 432,	paid thereon	$234.76	4	annual payments.
" 441,	"	203.77	4	"
" 442,	"	191.63	4	"
	Total	$630.16		

Sale price $2,000, giving a net profit to the trust of $1,369.84; and further that $1,000 has been paid in escrow by W. D. Hofius & Co. with whom the transaction was made. You further state that the above

(Testimony of Charles H. Baker.)

should include the following:

Block 443, paid thereon, $76.05
Block 444, paid thereon, 11.89

$87.94

The transaction as presented by you appears to be for the interests of the trust, and if you and the representative interests of your trust are satisfied that this is for the best interests of the creditors, and the best proposition you can obtain, you are authorized to petition the court for an order to sell upon the terms stated in your letter of the 22nd instant.

Very respectfully,
(Signed) CHARLES G. DAWES,
Comptroller.

Redirect Examination.

Q. (Mr. GROSSCUP.) This sale through Anderson to Hofius and Pigott was not finally consummated by you, that is there was something more to be done by Judge Frater afterwards?

A. I believe it was.

Q. Is that the matter, do you know, about which Judge Frater testified that he consulted with L. C. Gilman? A. Yes, sir, that is the matter.

Q. There appears upon page 307 of the journal the following entry: "June 4," under the general column of 1899, "Additional assets good Blocks 395, 396, 431, 866, 730 tide-land contracts." Opposite that "$1644.-15" in figures. In view of that entry, Mr. Baker, would you be certain that the entire amount of money paid by Pigott and Hofius in that transaction was

(Testimony of Charles H. Baker.)

paid to you, [253—157] or might it not have been paid to Frater afterwards?

A. Part of it was paid to Judge Frater.

The witness then stated that Mr. Simpson was connected with the Snoqualmie Falls Power Company and the consolidation of the street-car lines in Seattle and had a substantial contingent interest with the witness in these enterprises.

The witness also testified that Columbus Tyler was dead. That Columbus Tyler assisted in making out the quarterly reports.

Q. In your cross-examination, Mr. Baker,—in your direct examination, I called your attention to the examination made of your trust by Mr. Seeley; during or at the conclusion of that examination who gave directions to your counsel for the preparation of the order of the Court? A. Mr. Seeley did.

Q. Who were your counsel at that time?

A. Stratton, Lewis & Gilman.

Q. And Mr. Seeley says in his report substantially that all the assets of this bank, "The receiver is proceeding under the authority given him by you to exchange real estate holdings of the trust for receiver's certificates. The disposition of real estate in this manner is to the interest of the creditors of the trust. From one to five hundred per cent more can be obtained for such assets than if disposed of at a private or public sale." Was that matter called to your attention in connection with the preparation of this report, or did you and Mr. Seeley discuss it?

A. What matter?

(Testimony of Charles H. Baker.)

Q. The matter of exchanging the assets for receiver's certificates.

A. Why, he called my attention to it.

Q. Mr. Seeley says, "The remaining assets are practically bad and doubtful, from which in my judgment more can be obtained by compromise and private sale than through an [254—158] attempt to enforce collection and their disposal at public auction." Was it upon Mr. Seeley's conclusion and report that your petition to the Court and the Court's order thereafter was based for the sale of bad and doubtful assets. A. It was.

Q. And did you understand or did you not understand, in view of this report of Mr. Seeley and the order which he obtained, that that included all the remaining assets of the trust?

A. That included everything that was left.

Q. And did you act upon that conclusion?

A. I did.

Q. At that time? A. Yes.

Q. It appears from the letter which Mr. Bausman called attention to that you, in your letter to the comptroller possibly did not fully agree with Mr. Seeley in this respect, is that correct, or is it not; that is you say, there there is some prospect of an improvement in your letter, or words to that effect?

A. Yes.

Q. But you acted upon the examiner's report and what he did with respect to the petition for this sale?

A. Yes.

Q. During your entire receivership was there a dispute between you and the department respecting

(Testimony of Charles H. Baker.)

your liability upon this ten thousand dollars note?

A. No, there was not.

Q. Well, there was a discussion about it, whether you owed anything on it or not?

A. Yes, there was.

Q. And when the department finally concluded that that was a matter that ought to be prosecuted, you resigned? A. Yes.

Q. Did the department ever bring any action on that note through Mr. Frater or otherwise?

A. No, they never did.

Q. This Pigott and Hofius check, do you know from whom the money came to you, that payment of two thousand dollars and one thousand dollars?

A. I do not remember. I thought it came from Anderson; I don't know, though [255—159]

Q. Now, did you know, Mr. Baker, at that time and for some considerable time afterwards that Mr. Anderson was making some profit out of this transaction?

A. I did not know that he was making any profit until last fall when I was here.

Q. Did you know whether or not in this deal that Anderson made with Hofius and Pigott #429 was included by Mr. Simpson? A. I do not know.

Q. You did not know? A. No.

Q. Do you know whether or not the price that Hofius and Pigott paid included a consideration to Mr. Simpson for #439—you did not know that?

A. No, I did not know.

Q. Now, coming to the matter of your answer in this case. When you originally employed me as your counsel in this case, where were you?

(Testimony of Charles H. Baker.)

A. I was in Panama.

Q. And you communicated with me here?

A. Yes.

Q. When the answer was prepared and filed, were you in Seattle? A. No, I was not.

Q. Your attention has been called to certain inaccuracies in that answer, one of which is that I stated in the answer that you bought this property from Mr. Simpson on the open market; you have testified on cross-examination that you think that is an inaccuracy. What is your understanding of "the open market" in connection with your answer on this cross-examination?

A. The open market is where property is listed and known to be for sale.

Q. Suppose that it was in my mind and it would be a fact that the open market is any sale of property that can be purchased or bought; would you say then that this was an inaccuracy in my answer, that being the legal effect of those terms.

A. It might be the legal effect.

Q. In other words, in your cross-examination, you did not intend to criticize my use of those words, in view of the facts? A. No. [256—160]

Q. Now, Mr. Baker, did you at any time in connection with this answer, see it until you came here sometime the latter part of September last?

A. No, that was the first time I saw it.

Q. You and I were very busy in the litigation in Chicago? A. Yes.

Q. Involving the settlement of your father's estate.

Q. Did you or did you not hear me, at the time that

your deposition was taken in September, tell Mr. Bausman that there would be a correction in the answer in respect to when you contracted to buy this property? A. Yes.

Q. Or Mr. Goodale,—I think possibly was present.

A. Yes, I heard you say it.

Q. You heard me give them notice in that respect?

A. Yes, I did.

Recross-examination.

Q. (Mr. BAUSMAN.)—Just a question or two in recross-examination. Before the answer was filed here in Seattle you had conferences in Chicago with Mr. Grosscup about it, did you not? A. Yes.

Q. And you told him your best recollection of the affair at that time, didn't you? A. Yes.

Q. And that was before you saw, I believe, this railroad letter? A. Yes.

Q. Just one more question. Counsel asked you whether you understood from Mr. Seeley, the examiner, and the order of Court which he had obtained about selling bad and doubtful assets; whether you understood from that that you were to sell all the remaining assets of the trust?

A. That was my understanding.

Q. In view of that, I will direct your attention to Plaintiff's Exhibit No. 5, and I will ask you what your understanding is of the following; it is a letter dated October 29, 1897, in which you start out—I will read it to you—"I am in receipt of your favor of the 18th relating to the report of Mr. Seeley, examiner, upon the condition of this trust," and so on—

(Testimony of Charles H. Baker.)

that was acknowledging Mr. Seeley's report and order, wasn't it? [257—161]

A. Who is that letter to?

Q. That is the Comptroller of the Currency.

A. Yes.

Q. Now though you testified here that you were to sell all the remaining assets of this trust, you concluded, after saying that real estate has been rising, you use this language: "Appearances now indicate that the most active period of the trust, second only to the first six months of its life, will soon occur and I anticipate that some of the slowest of the assets can be handled to advantage and considerable cash realized. The widespread advertising given to this particular section on account of the Klondike gold excitement and the consequent impetus given to trade and immigration here, will soon prove a factor of profit to the trust not considered in making the estimate."

You wrote that letter after he had gotten that order? A. Yes.

Mr. KELLEHER.—I want to ask a few questions.

Q. (Mr. KELLEHER.) There was an inadvertence made in your statement, and I don't want you intentionally to make it. Now, looking at this receipt for a thousand dollars for the interest in block 431, it is in your handwriting, is it not, when you closed with Hofius & Company for the rights in block 431 (showing)? A. Yes.

Q. You receipted for that thousand dollars on the 15th of March? A. Yes.

Q. And you closed that transaction with Hofius or

(Testimony of Charles H. Baker.)

Pigott—I think you said Pigott? A. Yes.

Q. Pigott gave you a check for that thousand dollars? A. Yes, I think he did.

Q. You say you do not know how much he paid to Anderson? A. I do not.

Q. Now, following that, and coming to the sale of the other five blocks following, I will call your attention to journal page 306 and ask you to look at this entry of two thousand dollars "Additional assets good. Sale of Seattle tide-lands contracts 729, 730, 396, 866, 395, to W. D. Hofius & Co. $2,000." That was the amount which you agreed to sell that for to Hofius and Pigott?

A. To Anderson, and he turned it over to Hofius.

[258—162]

Q. But you received two thousand dollars and turned it in in your report? A. Yes.

Q. And you understood that was the full purchase price? A. Yes.

Q. That the estate was getting? A. Yes.

Q. And you so reported it to the comptroller?

A. Yes.

Q. In pursuance to that you executed an assignment of these contracts, and to refresh your recollection I will call your attention to Defendants' Exhibit "T"—to refresh your recollection look at the date, 14th of April, 1899 (showing)—"To block 441," signed on the date of the 14th of April, is it not?

A. Yes.

Q. And acknowledged by you before a notary public on the same day? A. Yes.

(Testimony of Charles H. Baker.)

Q. That was a day or two before you went out of office? A. Yes.

Q. You received this two thousand dollars and got full consideration which you understood was going to the trust for those five blocks? A. Yes.

Q. And you turned those contracts over to Hofius and Pigott and got the two thousand dollars?

A. Yes.

Q. And your recollection, you stated on your direct examination, was that you got a check from Hofius or from Pigott rather, for that two thousand dollars? A. Yes.

Q. Now, you do not mean to say to the Court that you understand now that Pigott afterwards paid the trust a day or two later some additional money for those five blocks, do you?

A. To Mr. Frater, you mean?

Q. Yes, to your successor—you do not mean to say that now to the Court, that Mr. Pigott, when you got authority to sell him this for two thousand dollars, afterwards [259—163] paid any more money to your successor, after he had gotten these contracts from you?

A. Well, I only know what the books say.

Q. All you mean is that you see something on page 307 after you closed your books, in someone's handwriting, either you or Mr. Hill's—that is all the information that you have, is it not?

A. That is all I know.

Q. And you do not mean to say, as a bookkeeper, that they received any additional money—that Mr.

(Testimony of Charles H. Baker.)

Frater received any additional money—you do not want the court to so understand you?

A. This is after I went out, is it?

Q. Yes. A. Well. I did not receive that.

Q. And you do not mean to say that you, as a bookkeeper—you do not mean to say that this shows that he did receive other money for those five blocks that went to the trust?

A. Well, I am not a bookkeeper for one thing, and I am not familiar with this matter for another thing.

Q. Really, in fact you do not know what this means, do you—you do not know what the entry is there for? A. I do not believe I do.

Q. And that is all the information that you have about it? A. Simply that it is in the book.

Mr. GROSSCUP.—Now as to these checks received; do you know whether it was the Anderson check or the Hofius check or Pigott's check, or whose it was?

A. I don't think I do. Mr. Hill can tell you that; he collected the checks.

[Testimony of William Pigott, for Plaintiff.]

WILLIAM PIGOTT was produced as a witness on behalf of the plaintiff.

The plaintiff introduced in evidence a certified copy of the document from the office of the clerk of the Superior Court of King County showing that there had been a contest [280—184] upon block 431. This was received in evidence and marked Plaintiff's Exhibit 26.

The witness then stated that he had resided in

(Testimony of William Pigott.)

Seattle since 1895, and is by occupation a manufacturer, being connected with the Seattle Car & Foundry Company, and engaged in the iron and steel business. That he is vice-president of the Pacific Coast Steel Company.

The witness testified that he remembered the purchase of the contested rights of the Merchants' National Bank to certain lots in block 431 from Charles H. Baker, receiver, the purchase being made in March 1899. That he paid about March 16 for these contested lots in block 431 $1700 or $1750. The witness stated that he did not now remember who first offered the property to him. That all that he now remembers is that it was brought to his notice that the land was for sale, and that Mr. Anderson had an option on it and that his business was transacted with Anderson. That he paid the purchase price in two checks—one was for $1000 to Mr. Baker, and one was for $750 to Mr. Anderson. The witness stated that about the same time as this purchase—within thirty or sixty days thereafter—he had purchased some more tide lands from Mr. Anderson. That after he purchased a portion of block 431 he began to look around to see if there was any other tide lands for sale. That he met Simpson and Anderson every few days and that he presumed the subject came up as a matter of gossip. The witness stated that he made an offer for certain tide lands at West Seattle. That he made the offer either to Mr. Simpson or to Mr. Anderson. That the price finally agreed upon was $5000 for blocks 429, 443,

(Testimony of William Pigott.)

444, and a part of 432, 441 and 442. That this payment was made in December, 1899, and was a lump sum for the six blocks. The witness then identified [261—165] a check for $5000 as being the check which he gave for these blocks, and the same was received in evidence and marked Plaintiff's Exhibit 27.

The witness stated that for several years after this purchase, which was in December, 1899, he tried to buy from Simpson and Baker block 430. That commencing immediately after this purchase he tried for two or three years to make the purchase of block 430, going first to Mr. Baker. The witness stated that Mr. Baker said he could not sell it and referred the witness to Mr. Simpson as the owner of the property. The witness further stated that Mr. Baker did not say that he had any interest in the property.

Mr. KELLEHER.—How many years after 1899, as nearly as you can recollect, was it after April, 1899?

A. Well, I really can't remember, but I kept pressing him for the purchase of that lot, beginning shortly after the first transaction, for probably two or three years.

Q. Pressing whom?

A. Everybody that I thought had anything to do with it.

Q. And who were those people that you did press that you thought had something to do with it?

A. Well, there was Mr. Simpson, Mr. Anderson and Mr. Baker.

(Testimony of William Pigott.)

Q. You cannot tell how soon after April, 1899, this first talk was with Mr. Baker; was it a year, do you think? A. I should imagine.

Q. About a year after April, 1899? A. Yes.

Q. Then did you go to Mr. Simpson?

A. I went to Mr. Simpson.

Q. About the purchase of this block? A. Yes.

Q. What did he say the first time about this, what was [262—166] the conversation between you as to the purchase of this at that time?

A. Well, his conversation, as nearly as I can remember it, was, that there were others interested in it.

Q. Did he say who those were? A. No.

Q. What else did he say?

A. That he was not in a position to offer it for sale.

Q. Did you see him afterwards? A. Yes.

Q. And what were the subsequent talks along that line—did you ever get a price out of him?

A. I did later.

Q. About when?

A. I would think it was a year later than that again.

Q. What price did you get; what was the talk?

A. He made me a price of thirty thousand dollars.

The COURT.—When was that—what year?

A. Well, it was no earlier than two years from the first transaction, and possibly it might have been within three years.

(Testimony of William Pigott.)

Q. Did he ever tell you in any of those conversations the name of any person that had an interest in that block other than himself? A. No, sir.

Q. Did you ever have any other talk with Baker about it?

A. I don't remember; I think probably I did.

Q. Did you ever learn from him who owned the block? A. No, sir.

Q. You never did find out in those different conversations between the two of them who owned the property? A. No, sir.

Q. It was a mystery to you at all times?

A. Yes, sir.

Q. You tried to find the ownership?

A. Yes. [263—167]

Q. And you were not successful? A. No, sir.

Q. And you tried it for years? A. Yes.

The COURT.—I see that block 431 is marked with a cross down there on the exhibit, and this map that I have here includes a great deal more.

Q. (Mr. KELLEHER.) What were the lots which you bought in block 431 from the bank?

A. Lots 34 to 49.

Q. That is what you paid the $1750 for.

A. Yes.

Cross-examination.

Q. (Mr. SHANK.) Mr. Pigott, I notice that this check of W. D. Hofius & Company is signed by W. D. Hofius. When did Mr. Hofius die?

A. Two years ago, I think—two years ago this spring.

(Testimony of William Pigott.)

Q. Mr. Hofius, up to the time of his death, and you up to the present time, have continued to reside in Seattle? A. Yes.

Q. You have been a member of the school board of the city of Seattle for how long a time?

A. Three years and a half.

Q. You have resided in Seattle how long?

A. Eighteen years.

Q. The deal or purchase that you made for five thousand dollars covered by this check to A. H. Anderson and S. G. Simpson, included block 429, did it not? A. Yes, sir.

Q. That is the block that was owned by S. G. Simpson at that time? A. Yes.

Q. (By the COURT.) Who made this price of thirty thousand dollars to you—Simpson or Baker?

A. Mr. Simpson.

Q. You did not have any conversation with Mr. Simpson [264—168] prior to 1899 about this property? A. Prior to 1899?

Q. Yes.

Mr. GROSSCUP.—Prior to the time you purchased the lots which you testified about in block 431?

A. No, not prior to that, no, sir.

[Testimony of Charles H. Baker, for Defendants (Recalled).]

CHARLES H. BAKER was recalled and testified that he never received, nor did Mr. Simpson account to him for the $1211.20 which Mr. Simpson received

(Testimony of Charles H. Baker.)

from the Seattle and San Francisco Railroad Company in August, 1903, for the thirty-foot right of way across block 430.

The plaintiff then offered in evidence a petition under date of July 19, 1897, signed by Charles H. Baker, praying the Judge of the United States District Court for an order permitting him to accept $25.00 in cash for a quitclaim deed and assignment of all the right, title and claim whatsoever of the Merchants' National Bank and the receiver to blocks 395, 396, 397, 398, 403, 404, 405, 409, 394, 399 and 402 of Seattle Tide Lads, upon which an application by the Merchants' National Bank had been filed, which said petition was admitted in evidence and marked Plaintiff's Exhibit 28.

The plaintiff also offered in evidence the order of C. H. Hanford, Judge of the United States District Court, under date of July 20, 1897, as prayed for, which said order was received in evidence and marked Plaintiff's Exhibit 29. [265—169]

The plaintiff then offered in evidence a letter from Charles H. Baker, receiver, under date June 17, 1897, to James H. Eckles, Comptroller of the Currency, which was admitted in evidence, marked Plaintiffs' Exhibit 30, and reads as follows:

Plaintiff's Exhibit 30 [Letter, Dated June 17, 1897, Chas. H. Baker to Comptroller of Currency.]

No. 2985.

THE MERCHANTS' NATIONAL BANK.
CHAS. H. BAKER.
Receiver.

Answered
Jun. 24, '97.
Org. Div.

Office Comptroller
Jun. 23, 1897,
of Currency.

Seattle, Wash. June 17—97

Hon. James H. Eckels,
Comptroller of Currency,
Washington, D. C.

Dear Sir:

By virtue of being a shore owner of upland property this bank is entitled to the prior right to purchase certain tide lands from the state. I have as you have been advised, completed the contracts for purchase of such lands as were awarded to the trust by the Tide Land Commission. The bank's application to purchase was rejected by the Commission on the following other described lands: Blocks 395—396—397—398—403—404—405—409—394—399 and 402 of Seattle Tide Lands. Under the law I may appeal to the courts and my attorneys think such appeal would be useless on the above, although on one other block I have taken an appeal. I am offered $25.00 cash for a relinquishment of the trust's rights in the above, or $100 contingent upon winning, by an attorney who thinks he can make something by taking up the appeals. I consider the

asset valueless and would accordingly recommend the acceptance of either alternative offer.

Very respectfully,

CHAS. H. BAKER,

Rec. [266—170]

The plaintiff then offered in evidence a letter from James H. Eckels, Comptroller of the Currency, to Charles H. Baker, receiver, under date of June 24, 1897, which letter was admitted in evidence, marked Plaintiff's Exhibit 31, and reads as follows:

Plaintiff's Exhibit 31 [Letter, Dated June 24, 1897, Comptroller of Currency to Chas. H. Baker.]

TREASURY DEPARTMENT.

Washington, June 24, 1897.

Office of
Comptroller of the Currency.
Address Reply to
Comptroller of the Currency.
M. L. C.
E. S.

Mr. Charles H. Baker,
Receiver, Merchants' National Bank,
Seattle, Washington.

Sir:

Your letter of the 17th instant is received, in reference to the interests of your trust in certain tide lands, and in view of your statement, you are hereby authorized to accept the offer of $25 for a relinquishment of any rights you may have in the property or $100 contingent upon the favorable result of an appeal to the court; the application of the bank to

purchase the lands, it being a shore owner, having been rejected.

Very respectfully,
(Signed) JAMES H. ECKELS,
Comptroller.

The plaintiff then offered in evidence the petition of the receiver, Charles H. Baker, under date of April 4, 1899, praying the Judge of the United States District Court for an order authorizing the receiver to sell and dispose of all of Lots 1 to 16 and 11 to 17, inclusive, Block 441, as shown on page 51, Vol. 2, Map of Seattle Tide Lands, filed in the office [267—171] of the Boad of State Land Commissioners at Olympia, Washington, on the 15th day of March, 1895. All of Lots 3, 4, 5, 6, 9, 10 and 11, Block 443, as shown on page 52 of the Map of Seattle Tide Lands, filed with the Board of State Land Commissioners at Olympia, Washington, on the 15th day of March, 1895. All of Lots 1, 2, 3, 4, 5, 6, 7, 8, 13, 14, 15, 16, 17, 18, 19, and 20, Block 432, according to survey thereof as shown on the Map of Seattle Tide Lands, filed in the office of the Board of State Land Commissioners at Olympia, Washington, on the 15th day of March, 1895. All of Lots 13 to 18, inclusive, Block 444, according to the survey thereof as shown on page 53, Vol. 2 of Map of Seattle Tide Lands, filed in the office of the Board of State Land Commissioners at Olympia, Washington, on the 15th day of March, 1895. A portion of Block 431, according to the survey thereof, as shown on the Map of Seattle Tide Lands. The said sale to be made for the sum of $3000, the petition setting forth that the petitioner

had received a proposition from W. D. Hofius to purchase the property for that sum.

The petition was admitted in evidence and marked Plaintiff's Exhibit 32.

An order dated April 26, 1899, in accord with the prayer of the petition was received in evidence and marked Plaintiff's Exhibit 33.

[Testimony of A. W. Frater, for Plaintiff (Recalled).]

A. W. FRATER was recalled as a witness on behalf of the plaintiff and testified that he did not receive any of the consideration paid by Hofius and Pigott as the purchase price of blocks 443, 442, 441 and 432, and that he had nothing to do with that transaction.

On cross-examination the witness stated that he remembered distinctly receiving a letter from the Comptroller of the [268—172] Currency directing him to make an entry in the books of the receivership relating to some $1500 or $1600 the exact amount the witness did not remember. That there seemed to be some error with reference to this item, and the comptroller wanted an entry made in the books to correct it, and the witness stated that he remembered distinctly that the entry was made pursuant to the letter received from the Comptroller of the Currency. The witness stated that the letter told just how to make the entry.

[Testimony of J. W. Schofield, for Plaintiff (Recalled).]

J. W. SCHOFIELD was recalled as a witness on behalf of the plaintiff, and, after being shown page 307 of the journal, stated that the entry was a memorandum entry only. That the item did not mean cash at all, and that this was shown upon the face of it. That it was simply an additional charge to the receiver to correct a previous entry.

On cross-examination the witness, in reply to a question as to whether the item may not have been discovered by someone examining the books, stated that it did not, for the reason that if the department had so found it, it would have removed the receiver from his trust very expeditiously. That if the department found an $1800 deficiency in the accounts of a receiver, his head goes off. **[269—173]**

In the District Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 1.

JOHN W. SCHOFIELD, Receiver,

Plaintiff,

vs.

CHARLES H. BAKER et al.,

Defendants.

Order Approving Statement of Evidence.

I, Jeremiah Neterer, Judge of the above-entitled court and the Judge before whom the above case was

tried, do hereby certify, the plaintiffs and the defendants being represented by their respective counsel in open court, that the foregoing is a true and complete statement of all the evidence essential to the decision of the questions presented by the appeal of the defendants from the judgment entered herein against the defendants and in favor of the plaintiffs; and I do hereby approve the same as the statement of the evidence in said matter for the purpose of said appeal, and do hereby order that the same become a part of the record for the purpose of said appeal. All original exhibits to be transmitted to the Appellate Court.

Done in open court this June 17, 1914.

JEREMIAH NETERER,
Judge.

Approved:

BAUSMAN.
SHANK.

[Indorsed]: Filed in the U. S. District Court, Western District of Washington. June 17, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [270]

[Order Extending Time to Prepare, etc., Transcript of Record on Appeal to July 6, 1914.]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1.

JOHN W. SCHOFIELD, as Receiver of MERCHANTS' NATIONAL BANK OF SEATTLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NORTON and SEATTLE WATER FRONT REALTY COMPANY, a Corporation,

Defendants.

Now on this 22d day of June, 1914, upon motion of attorneys for defendants, and for sufficient cause appearing, it is ordered that the time within which the Clerk of this court may prepare, certify and transmit to the United States Circuit Court of Appeals the transcript of the record in this cause be, and the same is hereby extended to and including the 6th day of July, 1914.

JEREMIAH NETERER,
District Judge.

[Indorsed]: Order. Filed in the U. S. District Court, Western Dist. of Washington. June 22, 1914. Frank L. Crosby, Clerk. Ed M. Lakin, Deputy. [271]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 1.

JOHN W. SCHOFIELD, as Receiver of the MERCHANTS' NATIONAL BANK OF SEATTLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NORTON and SEATTLE WATER FRONT REALTY COMPANY, a Corporation,

Defendants.

Citation [on Appeal (Copy).]

United States of America to John W. Schofield, as Receiver of the Merchants' National Bank of Seattle, Greeting:

You are hereby notified that in the above-entitled proceeding had in said United States District Court for the Western District of Washington, Northern Division, an appeal has been allowed to the said defendants to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree entered in said cause, and you are therefore hereby cited and admonished to be and appear in the said United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, in the State of California, on or before the 26th day of June, A. D. 1914, to show cause, if any there be, why the said final decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable JEREMIAH NETERER, Judge of said court, this 27th day of May, A. D. 1914.

JEREMIAH NETERER.

Service of the foregoing Citation admitted this 4th day of June, 1914.

[Seal] BAUSMAN, KELLEHER, OLDHAM & GOODALE,

Attorneys for John W. Schofield, Receiver of Merchants' National Bank of Seattle. [272]

[Indorsed]: In Equity—No. 1. United States District Court for the Western District of Washington, Northern Division. John W. Schofield, as Receiver of the Merchants' National Bank, Plaintiff, vs. Charles H. Baker et al., Defendants. Citation. Filed in the U. S. District Court, Western Dist. of Washington. June 9, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. Corwin S. Shank, H. C. Belt, B. S. Grosscup and W. C. Morrow, Attorneys for Defendants, Alaska Building, Seattle. [273]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1.

JOHN W. SCHOFIELD, as Receiver of MERCHANTS' NATIONAL BANK OF SEATTLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NORTON and SEATTLE WATER FRONT REALTY COMPANY, a Corporation,

Defendants.

Praecipe of Defendants for Record.

To Frank L. Crosby, Clerk of Said Court:

Kindly prepare, certify and transmit to the Clerk of the Circuit Court of Appeals for the 9th Circuit at San Francisco, a type-written transcript of the record upon appeal in the above-entitled cause containing the following portions of the record in the above-entitled cause, to wit:

1. Second Amended Complaint.
2. Answer of C. H. Baker to Second Amended Complaint.
3. Answer of A. S. Norton to Second Amended Complaint.
4. Amended Answer of Seattle Water Front Realty Company to Second Amended Complaint.
5. Memo. Decision of the Court.
6. Decree.

7. Petition for Appeal.
8. Assignment of Errors.
9. Order Allowing Appeal and Fixing Supersedeas Bond.
10. Appeal and Supersedeas Bond.
11. Citation.
12. Statement of Evidence.
13. Praecipe of Defendants for record on appeal.

Dated Seattle, Washington, June 4, 1914.

B. S. GROSSCUP,
CORWIN S. SHANK,
W. C. MORROW,
H. C. BELT,
Attorneys for Defendants. [274]

Copy of the within Praecipe received and due service of same acknowledged this 4th day of June, 1914.

BAUSMAN & KELLEHER,
OLDHAM & GOODALE,
Attorneys for Plaintiff.

[Indorsed]: Praecipe of Defendants for Record. Filed in the U. S. District Court, Western Dist. of Washington. June 9, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [275]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1.

JOHN W. SCHOFIELD, as Receiver of MERCHANTS' NATIONAL BANK OF SEATTLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NORTON and SEATTLE WATER FRONT REALTY COMPANY, a Corporation,

Defendants.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the 279 typewritten pages, numbered from 1 to 279, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the judgment of said United States District Court for the Western District of Washington, to

the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the defendants for the preparation and certification of the typewritten transcript of [276] record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S. as Amended by Sec. 6, Act of March 2, 1905), for making typewritten transcript of record—780 folios @ 30c	$234.00
Certificate of Clerk to typewritten transcript of record—3 folios	.90
Seal to said Certificate	.40
	$235.30

I hereby certify that the above cost for preparing and certifying record amounting to $235.30 has been paid to me by Messrs. Grosscup, Shank, Morrow and Belt, attorneys for defendants.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.

In witness whereof I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 23d day of June, 1914.

[Seal] FRANK L. CROSBY,
Clerk. [277]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 1.

JOHN W. SCHOFIELD, as Receiver of the MERCHANTS' NATIONAL BANK OF SEATTLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NORTON and SEATTLE WATER FRONT REALTY COMPANY, a Corporation,

Defendants.

Citation [on Appeal (Original).]

United States of America to John W. Schofield, as Receiver of the Merchants' National Bank of Seattle, Greeting:

You are hereby notified that in the above-entitled proceeding had in said United States District Court for the Western District of Washington, Northern Division, an appeal has been allowed to the said defendants in the United States Circuit Court of Appeals for the Ninth Circuit from the final decree entered in said cause, and you are therefore hereby cited and admonished to be and appear in the said United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, in the State of California, on or before the 26th day of June, A. D. 1914, to show cause, if any there be, why the said final decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable JEREMIAH NET-

ERER, Judge of said court, this 27th day of May, A. D. 1914.

[Seal] JEREMIAH NETERER,
Judge.

Service of the foregoing citation admitted this 4th day of June, 1914.

BAUSMAN, KELLEHER, OLDHAM & GOODALE,
Attorneys for John W. Schofield, Receiver of Merchants' National Bank of Seattle. [278]

[Endorsed]: In Equity—No. 1. United States District Court for the Western District of Washington, Northern Division. John W. Schofield, as Receiver of the Merchants' National Bank, Plaintiff, vs. Charles H. Baker et al., Defendants. Citation. Filed in the U. S. District Court, Western Dist. of Washington. Jun. 9, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

[Endorsed]: No. 2438. United States Circuit Court of Appeals for the Ninth Circuit. Charles H. Baker, Algernon S. Norton and Seattle Water Front Realty Company, a Corporation, Appellants, vs. John W. Schofield, as Receiver of the Merchants' National Bank of Seattle, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Received and filed June 26, 1914.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2438

United States

Circuit Court of Appeals

For the Ninth Circuit.

CHARLES H. BAKER, ALGERNON S. NORTON, and SEATTLE WATER FRONT REALTY COMPANY, a Corporation,

Appellants,

vs.

JOHN W. SCHOFIELD, as Receiver of the MERCHANTS' NATIONAL BANK OF SEATTLE,

Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

[Title of U. S. Circuit Court of Appeals and Cause Therein.]

[Stipulation for Correction of Printed Record, etc.]

It is stipulated in regard to the briefs as follows:

I.

A service by appellants of their brief upon appellee's counsel at Seattle on or before September 3, and of appellee's brief upon appellants' counsel at Seattle, on or before September 10, will be satisfactory to both parties.

II.

There having been printed on pages 73–6 of the record an interlocutory opinion of the Court in regard to certain interrogatories to Kane, Comptroller, and Schofield, Receiver, upon proposed deposition, the following may be considered also a part of the record on behalf of appellee:

"That on the proposed deposition of appellants to take this testimony, plaintiff offered no opposition to the following interrogatories:

'No. 1. State your name, place of residence, and present occupation.

'No. 2. If you reply that you are connected with the office of the Comptroller of the Currency, state your official position and how long you have been identified with that office, and the various positions you have officially occupied.

'No. 3. As such acting comptroller are you the custodian of all the books, records and files belonging to the comptroller's office?

'No. 4. When were you first acquainted with the claim which is made by John W. Schofield as receiver of the Merchants' National Bank of Seattle, as set forth in the foregoing suit?

'No. 6. Who appointed John W. Schofield, receiver of the Merchants' National Bank?' "

III.

That the following interrogatories proposed to be propounded to John W. Schofield, Receiver, were not objected to:

"No. 1. State your name, place of residence, and business.

"No. 2. By whom were you appointed receiver of the Merchants' National Bank?

"No. 3. How long before your appointment did you learn that you were being considered as receiver?

"No. 4. From whom did you first learn this fact?

"No. 5. From whom did you first learn anything with reference to the affairs of the Merchants' National Bank?"

IV.

That appellants, defendants below, did not proceed further with the depositions of these proposed witnesses.

V.

That the printed record may be amended by the clerk by interlineation in the following places:

On page 143, the word "Baker" at the end of line 6 shall be changed to the word "he."

On page 191, the journal entry, "Tide Land Con-

tracts Nos. 427–8–9 and 430" be changed to "727–8–9 and 730."

That on page 15, the signature "R. C. Grosscup" be changed to that of "R. C. Goodale."

Dated this 1st day of September, 1914.

B. S. GROSSCUP and
CORWIN S. SHANK,
Counsel for Appellants.
FREDERICK BAUSMAN,
DANIEL KELLEHER,
Counsel for Appellee.

[Endorsed]: Stipulation for Correction of Printed Record, etc. Filed Sept. 8, 1914. F. D. Monckton, Clerk.

At a stated term, to wit, the September term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the courtroom, in the City of Seattle, in the State of Washington, on Wednesday, the sixteenth day of September, in the year of our Lord one thousand nine hundred fourteen. Present: Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

No. 2438.

CHARLES H. BAKER et al.,

Appellants,

vs.

JOHN W. SCHOFIELD, as Receiver of the MERCHANTS' NATIONAL BANK OF SEATTLE,

Appellee.

Order of Submission.

ORDERED, appeal in the above-entitled cause argued by Messrs. B. S. Grosscup and Corwin S. Shank, counsel for the appellant, and by Mr. Frederick Bausman, counsel for the appellee, and submitted to the Court for consideration and decision, with leave to counsel for the appellee to file a reply-brief.

[Title of U. S. District Court and Cause Therein.]

[Certificate of Clerk U. S. District Court, Re Original Exhibits.]

CERTIFICATE OF CLERK AS TO ORIGINAL EXHIBITS.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that the hereto attached sealed package contains the Original Exhibits introduced and used upon the hearing and trial of the above-entitled cause as follows:

Plaintiff's Exhibits 1 to 20, inclusive; 22 to 27, inclusive; 29 to 33, inclusive.

Defendants' Exhibits "A" to "J," * inclusive; "R" to "X," inclusive; A–I to A–II, inclusive.

Said original Exhibits are herewith transmitted to the Circuit Court of Appeals, there to be inspected and considered together with the transcript of the record on appeal in the above-entitled cause; which said exhibits are so transmitted pursuant to the order of the said District Court so directing, a copy of which said order will be found attached to this Certificate. Copy of Order is also found on page 339 of printed transcript.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal, at Seattle, in said District, this 17th day of September, 1914.

[Seal] FRANK L. CROSBY,
Clerk.

[Endorsed]: Certificate of Clerk U. S. District Court Re Exhibits. Filed Sept. 21, 1914. F. D. Monckton, Clerk.

[Title of U. S. District Court and Cause Therein.]

[Order of District Court Directing Transmission of Exhibits to Appellate Court, etc. (Copy).]

ORDER APPROVING STATEMENT OF EVIDENCE.

I, Jeremiah Neterer, Judge of the above-entitled court, and the Judge before whom the above case was tried, do hereby certify, the plaintiffs and the de-

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[*Clerk's Note: Defendants' Exhibit "G" not received by Clerk U. S. Circuit Court of Appeals.]

fendants being represented by their respective counsel in open court, that the foregoing is a true and complete statement of all the evidence essential to the decision of the questions presented by the appeal of the defendants from the judgment entered herein against the defendants and in favor of the plaintiffs; and I do hereby approve the same as the statement of the evidence in said matter for the purpose of said appeal, and do hereby order that the same become a part of the record for the purpose of said appeal. All original exhibits to be transmitted to the Appellate Court..

Done in open court this June 17, 1914.

JEREMIAH NETERER,
Judge.

Approved:
BAUSMAN.
SHANK.

[Indorsed]: Filed in the U. S. District Court, Western District of Washington. June 17, 1914. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

[Endorsed]: Copy of Order of District Court Directing Transmission of Exhibits to Appellate Court, etc. Filed Sept. 21, 1914. F. D. Monckton, Clerk.

At a stated term, to wit, the October Term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fifteenth day of February in the year of our Lord one thousand nine hundred and fifteen. Present: Honorable WILLIAM B. GILBERT, Circuit Judge Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN JUDGMENTS AND DECREES.

[Order Directing Filing of Opinion of U. S. Circuit Court of Appeals, etc.].

ORDERED: That the typewritten opinion this day rendered by this Court in each of the following-entitled causes be forthwith filed by the clerk, and that a judgment or decree be filed, and recorded in the Minutes of this court, in each of the causes in accordance with the opinion filed therein; * * * Charles H. Baker et al. vs. John W. Schofield, as Receiver of the Merchants' National Bank of Seattle. * * *

[Title of U. S. Circuit Court of Appeals and Cause Therein.]

[Opinion U. S. Circuit Court of Appeals.]

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Suit in equity by John W. Schofield, as Receiver of the Merchants' National Bank of Seattle, for the conveyance by the appellants (defendants in the court below), to him, as such receiver, of certain tide lands situated in the City of Seattle, Washington, alleged to be held in trust by the appellants for the use and benefit of the Merchants' National Bank of Seattle.

On June 19th, 1895, the Merchants' National Bank of Seattle having become insolvent, the defendant, Charles H. Baker, was appointed receiver thereof by the Comptroller of the Currency of the United States, and immediately thereafter entered upon his duties as such Receiver. Among the assets which came into Baker's hands as such receiver was a preference right to purchase from the State of Washington certain tide lands, containing approximately twelve acres, situated along the Seattle water front, in King County, Washington, and designated as Block No. 430, Seattle Tide Lands. The preference right to purchase the tide lands existed in favor of the Bank by virtue of the fact that it was the owner of the upland bordering thereon. On January 12th, 1897, Baker, as receiver, entered into a contract with

the State of Washington for the purchase of the tide lands, the State of Washington agreeing to sell the same to the Merchants' National Bank of Seattle in consideration of the sum of $1488.00, the consideration to be paid by the Bank in ten equal payments of $148.80, the first payment to be made at the time of the execution of the contract, one thereof on the 1st day of March, 1897, and one thereof on the first day of each and every March thereafter until the whole of the purchase price was paid. Upon payment of the full consideration for the tide lands the Bank, under the contract, became entitled to receive, and the State of Washington agreed to issue to it, a patent therefor. The execution of this contract between Baker, as receiver, and the State of Washington, had not been authorized by the Comptroller of the Currency, but on January 26th, 1897, Baker requested that official, by letter, to ratify the contract, stating that the preference right of purchase was a valuable asset of the trust. On February 13th, 1897, and in reply to Baker's letter, the Comptroller of the Currency authorized him to contract with the State of Washington for the purchase of the tide lands. On October 6th, 1897, Baker, as receiver, petitioned the Circuit Court of the United States for the District of Washington, for an order authorizing and empowering him to compromise, compound or sell at private sale all of the bad and doubtful assets of the Merchants' National Bank of Seattle then in his hands as receiver, for cost, or for such sums as in the judgment of the receiver was for the best interest of his trust and all

persons concerned therein. Pursuant to such petition, and on the date of the filing thereof, the Court entered an order authorizing and empowering Baker to sell at private sale, all assets of the insolvent bank which were in his judgment bad and doubtful, consisting of bills receivable, judgments, overdrafts, stocks, bonds, warrants, securities, assessments upon the stockholders of said bank and other personal and chattel property and evidences of indebtedness, for cash, for such sum or sums as he, as such receiver, might be able to obtain, and as should in his judgment be for the best interests of his trust. On November 26, 1897, Baker, as receiver, sold, assigned and transferred all of the right, title and interest of the Merchants' National Bank of Seattle in and to its contract with the State of Washington for the purchase of Tide Lands Block No. 430, to one S. G. Simpson, the consideration being $198.80. The assignment authorized the State of Washington to receive from Simpson, or his assign, the performance of all covenants and agreements specified in the contract to be performed by the Bank, and upon such performance to execute to him a patent for such tide land. By virtue of the ownership by Simpson of the contract to purchase Tide Lands Block No. 430, he became entitled, under the laws of the State of Washington, to the preference right to lease certain harbor area adjacent and appurtenant to Tide Lands Block No. 430. Upon the purchase by Simpson of the contract to purchase the tide lands, there was issued to him by the State of Washington a certain lease, designated Harbor Lease No. 181, cover-

ing the harbor area appurtenant to Block No. 430.

In March, 1899, the contract between the Merchants' National Bank of Seattle and the State of Washington for the purchase of Tide Lands Block No. 430, theretofore assigned to Simpson by Baker, as receiver, together with Harbor Lease No. 181 covering the harbor area adjacent thereto, were purchased from Simpson by Baker in his individual capacity, and not as receiver. No formal assignment of the contract or of the lease was made, the record title continuing in the name of Simpson.

In April, 1899, Baker resigned as receiver of the Merchants' National Bank of Seattle, and thereupon Judge A. W. Frater was appointed by the Comptroller of the Currency as receiver thereof.

On August 11th, 1905, S. G. Simpson, acting for and on behalf of Baker, assigned the contract for the purchase of Tide Lands Block No. 430, together with the Harbor Lease No. 181, to one Algernon S. Norton. The consideration named in the assignment was $1.00. This assignment contained the same authorization respecting the patent to be issued by the State of Washington as that contained in the assignment to Simpson. On October 16, 1905, the State of Washington issued to Norton a patent covering all of Block No. 430 with the exception of a strip of land thirty feet wide which had been granted as a right of way to the Seattle and San Francisco Railway and Navigation Company. In August, 1907, there was organized at Seattle, under the laws of the State of Washington, the Seattle Water Front Realty Company. Upon the incorporation of this

company Norton conveyed to it Tide Lands Block No. 430, theretofore conveyed to him by patent from the State of Washington, together with Harbor Lease No. 181, covering the harbor area adjacent and appurtenant thereto.

On February 12th, 1913, Judge Frater resigned as receiver of the Merchants' National Bank of Seattle, and thereupon the plaintiff herein, John W. Schofield, was appointed receiver thereof by the Comptroller of the Currency. The present suit was instituted by Schofield immediately upon his appointment. It was alleged in the bill of complaint that the assignment of the contract between the Bank and the State of Washington for the purchase of Tide Lands Block No. 430, was made by Baker, as receiver, to Simpson, subject to a secret trust for the sole use and benefit of Baker and for the purpose of defrauding the insolvent Merchants' National Bank of Seattle, and its creditors and stockholders; that Simpson took and held the contract for the purchase of the tide lands in trust for Baker and subject to his direction and control; that the assignment of the contract and harbor lease by Simpson to Norton was made for the sole use and benefit of Baker; that Norton held the contract and the harbor lease, and, after issuance to him of the patent from the State of Washington, held the legal title to the tide lands for the sole and exclusive use of Baker; that the Seattle Water Front Realty Company was incorporated, and the legal title to the tide lands, together with the harbor lease, was conveyed to it by Norton, in furtherance of the fraudulent plan of Baker to

appropriate to himself and conceal and convert the assets of the Merchants' National Bank of Seattle, and to defeat the rights of its creditors and stockholders; and that the legal title to the tide lands is now held by the Seattle Water Front Realty Company as trustee for the plaintiff herein, as receiver of the Merchants' National Bank of Seattle.

It was further alleged in the bill that the facts therein set forth were concealed by the defendants, and were wholly unknown to any of the creditors or stockholders of the bank, or to the plaintiff herein, or to the Comptroller of the Currency of the United States, until the first day of February, 1913, and that the plaintiff, as such receiver, had been directed bythe Comptroller of the Currency to commence and prosecute this suit.

Answers were filed by the defendants denying the material allegations of the bill, and after the taking of testimony before the Court a decree was entered adjudging that Tide Lands Block No. 430 was an asset of the Merchants' National Bank of Seattle; that the assignment by Baker, as receiver, to Simpson, of the contract for the purchase of the tide lands was fraudulent, and was made for the secret use and benefit of Baker; that the repurchase of the contract by Baker was void as against the Bank; that the assignment of the contract to the defendant Norton, by Simpson, and the conveyance from Norton to the Seattle Water Front Realty Company, were also null and void. It was decreed that the Water Front Realty Company execute and deliver to the clerk of the court below, for the plaintiff, as receiver, its deed

covering all of its right, title and interest in and to Block No. 430, Seattle Tide Lands, and also an assignment of the Harbor Lease No. 181, appurtenant to the tide lands. It was further decreed that the plaintiff, as receiver, pay to the clerk of the court below, for the Seattle Water Front Realty Company, the sum of $10,977.13, being the amount of the payments, with interest, made by the defendants to the State of Washington under the contract for the purchase of Block No. 430, upon the Harbor Lease No. 181, and for taxes.

B. S. GROSSCUP, W. C. MORROW, CORWIN S. SHANK and HORATIO C. BELT, for the Appellants.

FREDERICK BAUSMAN, DANIEL KELLEHER, R. P. OLDHAM and R. C. GOODALE, for the Appellees.

Before GILBERT, ROSS and MORROW, Circuit Judges.

MORROW, Circuit Judge, after stating the facts, delivered the opinion of the court:

1. The validity of the contract of January 12th, 1897, between Baker, as receiver of the bank, and the State of Washington, for the purchase of the tide lands, is attacked by the defendants on the ground that the contract was *ultra vires*, its execution being an exercise of power not conferred upon national banks, or receivers thereof, by the statutes of the United States.

Section 5137 of the Revised Statutes of the United States provides as follows:

"A national banking association may purchase, hold and convey real estate for the following purposes, and for no others:—

"First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

"Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

"Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

"Fourth. Such as it shall purchase at sales under judgments, decrees or mortgages held by the association, or shall purchase to secure debts due to it.

"But no such association shall hold the possession of any real estate under mortgage, or the title or possession of any real estate purchased to secure any debts due to it, for a longer period than five years."

Chapter 28 of the act of March 29th, 1886 (24 Stats., page 8), provides as follows:

"Whenever the receiver of any national bank duly appointed by the comptroller of the currency and who shall have duly qualified and entered upon the discharge of his trust, shall find it in his opinion necessary, in order to fully protect and benefit his said trust, to the extent of any and all equities that such trust may have in any property, real or personal, by reason of any bond, mortgage, assignment or other proper legal claim attaching thereto, and which said property is to be sold under any execu-

tion, decree of foreclosure or proper order of any court of jurisdiction, he may certify the facts in the case, together with his opinion as to the value of the property to be sold, and the value of the equity his said trust may have in the same, to the Comptroller of the Currency, together with a request for the right and authority to use and employ so much of the money of said trust as may be necessary to purchase such property at such sale."

It is obvious that the contract for the purchase of the tide lands could not have been executed under Section 5137 of the Revised Statutes. It does not fall within any of the purposes enumerated in that section for which national banks may purchase, hold and convey real estate. Nor can the provisions of the act of March 29th, 1886, be construed to give validity to the contract. The bank had no equity in the property "by reason of any bond, mortgage, assignment or other proper legal claim attaching thereto," nor was the property "to be held under any execution, decree of foreclosure or other proper order of any court."

The contract for the purchase of the tide lands grew out of the preference right to purchase, under the laws of the State of Washington, which existed in favor of the bank by virtue of the fact that it was the owner of the upland bordering thereon. The record does not disclose the manner in which the bank became the owner of the upland. It must be assumed, however, that the acquisition of the upland by the bank was in all respects legal. In the light of the fact, well known in the field of commerce, that

the value of property adjacent to harbor sites may be increased to a material extent by reason of a preference right to purchase tide lands adjacent thereto, we think that the contract between the bank and the State for the purchase of the tide lands might well be viewed as a part of the transaction by which the bank acquired the upland, and as much a part of the valuable assets of the bank as would have been the original littoral or riparian right attached to the upland.

But in the view which we take of this case, the question of the right of the receiver to execute the contract on behalf of the bank for the purchase of the tide lands becomes immaterial. It may be conceded that the contract was *ultra vires.* But its invalidity by reason of the fact that it was *ultra vires* cannot be interposed by the defendants as a defense to a suit of this character.

In the case of National Bank v. Matthews, 98 U. S. 621, it appeared that Matthews and another person had given their joint note to a mercantile company for $15,000, secured by a deed of trust on certain real property in Missouri, executed by Matthews alone. Soon afterwards the company assigned the note and deed of trust to the Union National Bank of St. Louis, to secure a loan made to it at the time. The loan was not paid at maturity and the bank directed the trustee to sell the premises. Matthews thereupon filed a bill to enjoin the sale, upon the ground that the loan was made upon real security in violation of Section 5136 of the Revised Statutes restricting loans by national banks to

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personal security. Mr. Justice Swayne, delivering the opinion of the Supreme Court of the United States, said:

"The object of the restrictions was obviously threefold. It was to keep the capital of the banks flowing in the daily channels of commerce; to deter them from embarking in hazardous real estate speculations; and to prevent the accumulation of large masses of such property in their hands, to be held, as it were, in mortmain. The intent, not the letter, of the statute constitutes the law. A court of equity is always reluctant in the last degree to make a decree which will effect a forfeiture. The bank parted with the money in good faith. Its garments are unspotted. Under these circumstances, the defense of *ultra vires*, if it can be made, does not address itself favorably to the mind of the Chancellor. We find nothing in the record touching the deed of trust which, in our judgment, brings it within the letter or the meaning of the prohibitions relied upon by the counsel for the defendant in error. * * *

"Sedgwick (Stat. and Const. Constr. 73), says: 'Where it is a simple question of authority to contract, arising either on a question of irregularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which he retains.' * * *

"We cannot believe it was meant that stockhold-

ers, and perhaps depositors and other creditors, should be punished and the borrower rewarded, by giving success to this defense whenever the offensive fact shall occur. The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other, contemplated by Congress.

"That has always been the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the government."

In National Bank v. Whitney, 103 U. S. 99, the facts were as follows: Whitney had executed a mortgage upon certain premises to the National Bank of Genesee, New York, providing in terms for the payment of $5,000 one year from its date, with interest, but declaring that it was made as collateral security for the payment of all notes which the bank held at the time against him and for his other indebtedness then due or thereafter to become due. The principal question for determination related to the validity of the mortgage of Whitney to the national bank, so far as it applied to future advances to him. It was contended by Whitney that the mortgage to the bank so far as it applied to future advances was invalid because a mortgage of that character was prohibited by Section 5137 of the Revised Statutes. The Supreme Court of the United States, in overruling this contention and referring to the construc-

tion of that act given in National Bank v. Matthews, *supra*, said:

"The construction of the act of Congress thus given has been acted upon by the national banks throughout the country ever since it was published. It is not unreasonable to suppose that they have conducted their business and made loans to a large amount in reliance upon it, and that in many cases great injury would follow a departure from it. Judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, certainly not because of subsequent doubts as to their soundness. The prosperity of a commercial country depends, in a great degree, upon the stability of the rules by which its transactions are governed. If there should be a change, the legislature can make it with infinitely less derangement of those interests than would follow a new ruling of the Court, for statutory regulations would operate only in future.

"The decision in the case cited controls the present case, and in conformity with it we must hold that the mortgage to the bank, so far as the subsequent encumbrances are concerned, is to be regarded as a valid security for the future advances to the mortgagor. Whatever objection there may be to it as security for such advances from the prohibitory provisions of the statute, the objection can only be urged by the government."

In Reynolds v. Crawfordsville Bank, 112 U. S. 405, the Supreme Court, again construing Section 5137 of the Revised Statutes, said:

"The national banking law, Revised Statutes, sec. 5137, provides that a national banking association may purchase such real estate as shall be mortgaged to it in good faith by way of security for debts previously contracted. The power to purchase the real estate in dispute, was, therefore, clearly conferred by the statute. The fact that, in order to secure the same debt, it purchased other real estate not mortgaged to it, cannot affect the title to the land which it was authorized to purchase. But if there was any force in this objection to the title, it could not be raised by the debtor, for where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void but only voidable; the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose." (Citing National Bank v. Matthews, *supra;* National Bank v. Whitney, *supra;* and Swope v. Leffingwell, 105 U. S. 3.)

In Thompon v. Saint Nicholas National Bank, 146 U. S. 240, the Supreme Court said:

"It has been held repeatedly by this court that where the provisions of the national banking act prohibit certain acts by banks or their officers, without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the United States, and not by private parties."

In Schuyler National Bank v. Gadsden, 191 U. S. 451, the doctrine was again reiterated by the Supreme Court in the following language:

"It is no longer open to controversy that the pro-

visions of the statutes of the United States forbidding the taking of real estate security by a national bank for a debt coincidently contracted do not operate to make the security void, and thus enable the individual who has contracted with the bank to defeat recovery, but simply subject the bank to be called to account by the Government for exceeding its powers."

2. The next question in the case relates to the validity of the assignment of the contract for the purchase of the tide lands made by Baker, as receiver, to Simpson. The validity of that assignment is attacked by the plaintiff on two grounds:

First: The assignment was void in law, it not being authorized by order of Court, as provided by the statute.

Second: The assignment, even if good in law, was made by Baker to Simpson subject to a secret trust for the sole use and benefit of Baker, and for the purpose of defrauding the Merchants National Bank of Seattle and its creditors and stockholders.

The objections will be considered in the order given.

Section 5234 of the Revised Statutes of the United States, after providing for the appointment of receivers for defaulting national banks, provides as follows:

"Such receiver, under the direction of the Comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to it, and, upon the order of a court of record of competent

jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the Court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. * * * "

On October 6th, 1897, pursuant to a petition filed by Baker as receiver of the bank, the Circuit Court of the United States for the District of Washington entered an order authorizing and empowering Baker to sell at private sale, "all assets of the insolvent bank which were in his judgment bad and doubtful, consisting of bills receivable, judgments, overdrafts, stocks, bonds, warrants, securities, assessments upon the stockholders of said bank and other personal and chattel property and evidences of indebtedness." This was the only order for the sale of assets of the bank made by the Court. The authorization therein given was clearly insufficient to warrant the assignment of the contract for the purchase of the tide lands. The order of the Court applied to assets of the bank which were in the judgment of the receiver bad or doubtful. It appeared from Baker's letter of January 26th, 1897, to the Comptroller of the Currency, that the right of purchase of the tide lands was at that time, in his judgment, a valuable asset of the estate. There is nothing in the record tending to show that the value of the right had depreciated between the date of Baker's letter on January 26th, 1897, and November 26th, 1897, the date of the assignment of the contract to Simpson. But there is a stronger reason why the order of the Court was

insufficient to confer upon the receiver authority for the assignment to Simpson. The assets to be sold were stated to consist of "bills receivable, judgments, overdrafts, stocks, bonds, warrants, securities, assessments upon the stockholders of said bank, and other personal and chattel property and evidences of indebtedness." The order of the Court in terms applied only to personal property. Under the decisions of the Supreme Court of the State of Washington, the interest of the bank in the tide lands under the agreement to purchase was real estate. (Washington Iron Works v. King County, 20 Wash. 150; Trimble v. Superior Court, 31 Wash. 445; State, ex rel. Wilson v. Grays Harbor & Puget Sound Ry. Co., 60 Wash. 32.)

The order of the Court of October 6th, 1897, did not authorize the receiver to sell real estate, and no order was ever entered or made by the Court authorizing such sale. But whether the sale and assignment of the contract by Baker, as receiver, to Simpson, without an order of the Court, could alone be made a sufficient basis for a decree in favor of the plaintiff in this suit is a question we do not decide. The fact that there was no order made for the sale of the contract, and it was therefore made and assigned without legal authority, is in and of itself evidence tending to show the concealment and fraudulent character of the transaction.

We pass, therefore, to the second objection urged by the plaintiff to the assignment by Baker to Simpson, viz.: That it was made subject to a secret trust

for the sole use and benefit of Baker and for the purpose of defrauding the Merchants' National Bank of Seattle and its creditors and stockholders.

3. The contract for the purchase of the tide lands was assigned by Baker, as receiver of the bank, to Simpson, on the 26th day of November, 1897. The consideration named therein was $198.80. The real consideration, according to the testimony of Baker, was $50.00; the balance of the consideration named in the assignment, to wit: $148.80, representing the first payment on the contract which had been made by the bank to the State of Washington at the time of the execution thereof. Baker further testified that the contract covering Block 430 was resold by Simpson to him, at his request, in March, 1899, for between $300.00 and $400.00, which represented the purchase price paid by Simpson, $198.80, plus the payment of March, 1898, to the State of Washington, $148.80, together with interest. No written assignment of the contract, or other document evidencing the transfer, was ever executed, Baker testifying that he told Simpson he would like to have him carry the title for him for the reason that there were at that time several judgments outstanding against him. During all these transactions Baker continued as receiver of the Merchants' National Bank of Seattle. He resigned as such receiver in April, 1899.

The title to the contract remained in Simpson from the date of its assignment to him by Baker, as receiver, until August, 1905. At about this time, according to the testimony of Baker, he took up with Simpson the matter of acquiring the legal title to the

contract. Simpson had made all of the annual payments to the State of Washington pursuant to the terms of the contract. Baker testified that he gave to Simpson his note for the amount of these various payments, and at his (Baker's) request, the title to the contract was placed in the name of Algernon S. Norton, Baker's New York attorney. The record shows that the assignment from Simpson to Norton was executed on August 11th, 1905. Thenceforth, the contract of purchase, and (after the issuance of the patent by the State of Washington to Norton on October 16th, 1905), the legal title to the tide lands, remained in Norton until the organization of the Seattle Water Front Realty Company in August, 1907. The property was then transferred by Norton to the Realty Company, at the request of Baker, in payment of the complete issue of its capital stock of $250,000.00. About ninety-five per cent of the stock was issued to Baker, or to others in trust for him; and he is at the present time the owner of all of the stock of the Realty Company with the exception of a few shares held by his friends for voting purposes. Despite Baker's ownership of practically all of the stock of the Realty Company, neither at the time of the organization of that company nor at any time since its organization has he held office in the company in any capacity.

Baker testified that at the time of the assignment of the contract by himself, as receiver of the bank, to Simpson, he reserved no interest, present or expectant therein, nor did he at that time have any expectation of ever acquiring any interest in the

contract. But we are of opinion that the testimony of the other witnesses in the case, viewed in the light of all of the circumstances surrounding the transfer of the contract to Simpson, as well as the transactions relating to the subsequent transfers of the contract, contradicts Baker's testimony and conclusively establishes the fact that the assignment of the contract for the purchase of the tide lands by Baker, as receiver of the bank, to Simpson, was made with a secret understanding between Simpson and Baker that the contract should be held in trust by Simpson for the use and benefit of Baker.

It appears from the record that the Klondike gold discovery in Alaska occurred in July, 1897. There is abundant testimony tending to show that real estate generally in Seattle, and the tide lands particularly, were greatly increased in value by reason thereof; and that the fair market value of Block 430 of the Seattle Tide Lands in November, 1897, was $5,000.00. The contract for the purchase of this block was conveyed by Baker, as receiver, to Simpson, for $198.80. The testimony further tended to show, and the court below found, that the market value of Block 430 in March, 1899, was from $5,000.00 to $15,000.00. Baker repurchased the contract from Simpson for from $300.00 to $400.00. In the same month (March, 1899), certain portions of tide lands Block No. 431, adjoining Block 430, was sold by Baker, as receiver of the bank, to one William Pigott, for $1700.00. It appears from the testimony that the lands sold to Pigott were in litigation, and were of less value than any portion of

Block 430. Had the assignment of the contract for the purchase of the tide lands from Baker, as receiver, to Simpson, been a *bona fide* transaction, vesting in Simpson the absolute right of disposition thereof, it is absolutely inconceivable that Simpson would have reconveyed the contract to Baker for $300.00 or $400.00, which represented no profit to Simpson, but solely the amount of money which he had expended, with interest, and at a time when adjoining property of less value was selling for $1,700.00.

Francis Rotch, a witness for the plaintiff, testified that he had been bookkeeper and private secretary to Simpson from 1898 to the time of Simpson's death in 1906. He testified to a conversation with Simpson in 1900, respecting an interest payment which had become due on Block 430. Upon asking Simpson if he should pay it, Simpson replied: "Yes, pay it; but that belongs to Charlie Baker." The witness testified that he paid the interest and charged it against Baker in his books. This witness testified to a further conversation with Simpson about 1902. It seemed that Simpson had been selling a lot of his holdings for the purpose of securing cash. In response to a question of the witness as to whether he could dispose of Block 430, Simpson replied: "No, Mr. Baker put that in my hands and I have held it in trust for him right along. We can't dispose of that."

Lester Turner, a witness for the plaintiff, testified to a conversation with Simpson respecting tide lands, in the year 1898 or 1899, as follows. "He told

me that a portion of these lands belonged to Charlie Baker; that he was carrying the title for him, to accommodate him." Turner testified to a second conversation with Simpson a year or two later, as follows: "I asked him how he came to hold the title to that property that belonged to Baker. 'Well,' he said, 'Baker didn't want it known that he had taken the property while he was receiver of the bank and it might not bear investigation,' and he was carrying it for him for that reason."

Mark E. Reed was a son-in-law of Simpson and had charge of the properties of Simpson under a general power of attorney. Reed testified to a conversation between himself and Simpson with respect to the tide lands, in 1904, as follows: "He said, 'Now, these West Seattle tide lands belong to Charlie Baker. When you are reimbursed for the amount we paid on it you transfer it.' " Baker testified that Simpson had made the payments to the State of Washington called for by the contract of purchase, subsequent to its assignment to him, and prior to the repurchase by Baker in March, 1899. But there was introduced in evidence the following letter written by Baker to Reed on May 9, 1904, during the pendency of the negotiations for the transfer from Simpson to Baker, or to Norton, of the legal title to the contract (the italics are ours):

"I had a talk with Mr. Simpson in S. F. about the tide lands which he holds in trust for me. I asked him if he would take my note in settlement of the advances he has made, together with the interest accrued thereon. *The first two or three payments I*

made myself. Mr. Simpson's books, however, will show the status of the account. There is one more payment due next March to complete the contract with the state. Mr. S. stated that you held his general power of attorney and would assign the certificate back to me or my order. I wish you would compile a statement of the account I owe to Mr. Simpson and send same together with note for the account, due one year after date, which plan Mr. S. consented to and will doubtless advise you to that effect. I may be away several months, and I may have occasion to use the item, or to dispose of it, and so I think it had better be put in the shape indicated. My address will be as below. I believe there is an item to my credit also of a certain sum for right of way across the tract sold to the N. P."

We agree with the Court below that "there was a condition of mind between Baker and Simpson, express or otherwise, which was that Baker should have Block 430. When the relation of the parties, the value of the land, and all of the circumstances as disclosed by the evidence is analyzed and applied, together with the suppression of the ownership of defendant Baker, the conclusion is inevitable."

The rule is laid down by the text-writers, and adhered to in many authoritative decisions, that if an agent or trustee in the sale of property of his principal purchases it himself, or any interest therein, either directly or through the instrumentality of a third person, without the knowledge or consent of the principal, the sale is voidable, and may be set aside at the option of the principal. (Mechem

on Agency, sections 455, 461; Michoud v. Girod, 4 How. 503; Gardner v. Ogden, 22 N. Y. 327; Wormley v. Webb, 44 Mo. 444; Mills v. Goodsell, 5 Conn. 475; Bain v. Brown, 56 N. Y. 288.)

The rule is one calculated to promote fair dealing between an agent or trustee and his principal law has but one of the many safeguards which the law has thrown around those occupying positions of trust and confidence. It prohibits an agent or trustee from becoming a party to a transaction in which he may be in a position to injure his principal. As stated by Judge Manning in People v. Township Board of Overyssel, 11 Mich. 222, 225:

"So careful is the law in guarding against the abuse of fiduciary relations, that it will not permit an agent to act for himself and his principal in the same transaction, as to buy of himself, as agent, the property of his principal, or the like. All such transactions are void, as it respects his principal, unless ratified by him with a full knowledge of all the circumstances."

The leading case in the United States upon this subject is Michoud v. Girod, 4 How. 503. In that case a piece of property had been sold at a fair price at a legally conducted judicial sale. The purchasers within a short time reconveyed it to the executors individually. It was decided that the purchasers at the sale were purely nominal. The Supreme Court said:

"The morality and policy of the law as it is administered in courts of equity induce us to add that these purchasers were fraudulent and void and may

be declared to be so without further inquiry, upon the ground that they were made through the intervention of parties who were nominal buyers of the property for the purpose of reconveying to the executors. Such a transaction carries fraud upon its face. The rule of equity in every jurisdiction with which we are acquainted is that a purchase by a trustee or agent of the particular property of which he has the sale or for which he represents another, whether he has an interest in it or not, *per interpositam personam*, carries fraud on the face of it."

In Boynton v. Bristow, 53 Maine, 362, real estate had been sold by executors and subsequently purchased by one of them at the price for which it had been sold. The court said:

It is enough, however, for us to know that the property was redeeded to one of the trustees for the same consideration for which it was sold before his duties as trustee were ended. Equity will not permit a trustee thus to deal with a trust property except for the benefit of the *cestui que trust*. Sound policy requires all the skill and efforts of a trustee to be used for the benefit of the *cestui que trust*, and to secure this end his private interest must not be allowed to come in conflict with his duty. If a trustee should be allowed to sell the trust's estate and then immediately buy it back for his own benefit, his private interests would be in direct conflict with his duty. To enable him to buy cheap he must sell cheap. Instead of making known its good qualities and its real value and the true state of the estate, he would be influenced to disparage the estate by con-

cealing, as far as he could, everything which would enhance its value, and to avoid clearing up any clouds that might hang over the title."

In Robertson v. Chapman, 152 U. S. 673, the facts were as follows: One Polk had been appointed as agent of the plaintiff Robertson for the purpose of selling certain real property to M. O'Donohoe. O'Donohoe was unable to complete the payments under his contract of purchase, and before the deed was delivered to O'Donohoe, and while the same was in the hands of Polk, the agent, to be delivered upon payment of the balance of the purchase price of the land, Polk took over the O'Donohoe contract and completed title in himself. Robertson subsequently brought suit against Polk and his partner, Chapman, to set aside the transaction, on the theory that Polk could not properly have taken title to the property. Mr. Justice Harlan, delivering the opinion of the Supreme Court of the United States, said:

"If an agent to sell effects a sale to himself, under the cover of the name of another person, he becomes, in respect to the property, a trustee for the principal, and, at the election of the latter, seasonably made, will be compelled to surender it, or, if he has disposed of it to a *bona fide* purchaser, to account not only for its real value, but for any profit realized by him on such resale."

The Court found that Polk had not been guilty of dereliction of duty; that while there was some evidence tending to show that he desired, from the outset, to acquire an interest in the property, it did not appear that he intended to practice any decep-

tion upon the plaintiff. The Court also found that Polk had not intended to conceal the fact of his purchase of the property. It accordingly was held that the rule quoted was not applicable to the facts of that case. The Court said:

"A real *bona fide* sale of the property, through the agency of Polk, and upon the terms prescribed by the plaintiff, and which sale was substantially completed between vendor and vendee, intervened between Polk's acceptance of the position of agent and his purchase of the property from the plaintiff's vendee. Upon this ground, the decree below can be sustained without impairing in any degree the rule that an agent will not be permitted to become the purchaser, without the knowledge or consent of his principal, of property committed to him for sale."

The defendants earnestly contend that the facts of the present case bring it within the rule laid down in Robertson v. Chapman. It is obvious that that rule is inapplicable here. Baker's deceit, as we have seen, is well established. Furthermore, no real *bona fide* sale of the contract for the purchase of the tide lands had intervened between Baker's appointment as receiver of the Bank, and his purchase of the contract.

4. In answer to the contention of the defendants that the present suit is barred by laches little need be said. We have searched the record in vain for testimony even of the slightest tending in the remotest degree to show either actual knowledge, or any channel leading to knowledge, on the part of the plaintiff, or his predecessors in office, or the Comp-

troller of the Currency of the United States, respecting the purchase by Baker of the contract covering the tide lands during the term of his receivership. During Baker's fourteen years' ownership of this property, never once has it appeared in his name Although Baker himself testified that when he negotiated with Simpson for the transfer of the legal title to the contract of purchase, to himself, all outstanding claims against him had been satisfied and he was practically out of debt, nevertheless the title to the contract was placed in the name of Norton, his New York attorney, where it remained until the organization of the Seattle Water Front Realty Company. Although the owner of practically all of the stock of that company from the date of its organization down to the present time, Baker has never appeared in any of its activities as an officer thereof or in any other capacity. Every avenue by which the transactions affecting the transfer of real property generally become known in the business world has been guardedly closed; every act tending to show the relationship of Baker to the tide lands has been zealously guarded.

"In general, length of time is no bar to a trust clearly established to have once existed; and where fraud is imputed and proved, length of time ought not to exclude relief. Prevost v. Gratz, 6 Wheat. 481. Generally speaking, when a party has been guilty of such laches in prosecuting his equitable title as would bar him if his title were solely at law, he will be barred in equity, from a wise consideration of the paramount importance of quieting men's

titles, and upon the principle that *expedit reipublicae ut sit finis litium;* although the statutes of limitation do not apply to any equitable demand, courts of equity adopt them; or at least generally take the same limitations for their guide, in cases analogous to those in which the statutes apply at law. Lo Ves. 467; 1 Cox Ch. 149. Still, within what time a constructive trust will be barred must depend upon the circumstances of the case. Boone v. Chiles, 10 Pet. 177. There is no rule in equity which excludes the consideration of circumstances, and, in a case of actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or becomes known to the party whose rights are affected by it." (Michaud v. Girod, 4 How. 502, 560.)

5. The Court below decreed that the plaintiff, as receiver, pay to the clerk of the court for the Seattle Water Front Realty Company, the sum of $10,977.13, being the amount of the payments, with interest, made by the defendants to the State of Washington under the contract for the purchase of the tide lands, upon the Harbor Lease, and for taxes. The defendants assert that they should not be compelled to reconvey the tide lands to the plaintiff, as receiver, for the reason that the testimony in the case shows that the receiver has no funds in his hands and that there are no assets of the bank except the claim asserted in this suit. But such defense is not avail-

able to the defendants on this appeal. This Court will presume that the money will be paid into the court below, for the defendants, as directed by the decree, and that a reconveyance of the tide lands will not be demanded until such sum has been paid into the court below.

The decree of the Court below is affirmed.

[Endorsed]: Opinion, U. S. Circuit Court of Appeals. Filed Feb. 15, 1915. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2438.

CHARLES H. BAKER, ALGERNON S. NORTON, and SEATTLE WATER FRONT REALTY COMPANY, a Corporation,

Appellants,

vs.

JOHN W. SCHOFIELD, as Receiver of the MERCHANTS' NATIONAL BANK OF SEATTLE,

Appellee.

[Decree, U. S. Circuit Court of Appeals.]

Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed, with costs in favor of the appellee and against the appellants.

It is further ordered, adjudged and decreed by this Court, that the appellee recover against the appellants for his costs herein expended, and have execution therefor.

[Endorsed]: Decree, U. S. Circuit Court of Appeals. Filed and entered Feb. 15, 1915 F. D. Monckton, Clerk.

[Title of U. S. Circuit Court of Appeals and Cause Therein.]

Petition for Appeal [to Supreme Court of U. S.].

Now come the above-named appellants, Charles H. Baker, Algernon S. Norton and Seattle Water Front Realty Company, a corporation, and complain that in the record and proceedings and also in the rendition of the decree in the United States Circuit Court of Appeals for the Ninth Circuit, sitting in San Francisco, in the State of California, in the above styled and numbered cause, on the 15th day of February, A. D. 1915, affirming the decree of the United States District Court for the Western District of Washington, Northern Division, in said cause, manifest error has intervened to the great damage of the petitioners; that the matter in controversy in said suit exceeds one thousand dollars ($1,000.00) besides costs, and that the jurisdiction of the said

District Court of the United States depended upon the fact that the above-named appellee, who was plaintiff in the said District Court, was a receiver duly appointed by the Controller of the Currency of the United States of a national bank, and this is not a case in which the jurisdiction of the Circuit Court of Appeals is made final.

WHEREFORE these petitioners pray for an allowance of the appeal to the end that the cause may be carried to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by the appellants may be reviewed, and, if error be found, corrected according to the laws and customs of the United States, and these petitioners further pray for a supersedeas of said judgment and such other process as is required to perfect the appeal prayed for to the end that the errors therein may be corrected.

B. S. GROSSCUP,
W. C. MORROW,
CORWIN S. SHANK,
H. C. BELT,
Solicitors for Appellants.

[Endorsed]: Petition for Appeal to Supreme Court of U. S. Filed Apr. 5, 1915. F. D. Monckton, Clerk.

[Title of U. S. Circuit Court of Appeals and Cause Therein.]

Assignment of Errors [on Appeal to Supreme Court U. S.].

The said appellants in the above-entitled cause, Charles H. Baker, Algernon S. Norton, and Seattle Water Front Realty Company, a corporation, in connection with their appeal herein, present and file therewith their assignment of errors as to which matters and things they say that the decree entered herein on the 15th day of February, A. D. 1915, is erroneous, to wit:

I.

Because the said appellee has no right or authority under the laws of the United States to maintain the action set forth in the second amended bill of complaint on which said cause was tried.

II.

Because the said appellee has no authority and has at no time had any authority from the officers of the Government of the United States having jurisdiction of receiverships of national banks, to comply with the conditions of the decree which was rendered, or of any decree which under the issues might have been rendered, in that said officers had not, prior to the commencement of said suit, nor have they since the commencement of said suit, authorized the payment to appellants or either of them of the money adjudged to be due under the findings of the Court and the money to which said appellants would be entitled under any decree which might or could have been rendered.

III.

Because there is not and has not been for more than ten years last past available to the trust which the receiver represents in this action any funds with which to do equity to the appellants or either of them.

IV.

Because the said Circuit Court of Appeals erred in affirming the District Court in finding and adjudging that the appellant Baker had no authority to sell Tide Land Contract No. 728 covering the purchase from the State of Washington of Tide Land Block 430 to Sol G. Simpson.

V.

Because the said Circuit Court of Appeals erred in affirming the District Court in finding and adjudging that the appellant Baker, while acting as receiver of the Merchants' National Bank, did not make a *bona fide* sale of Tide Land Contract No. 728 covering Tide Land Block 430 to Sol G. Simpson, and in finding that the said Baker at the time of making said sale reserved to himself, for his own benefit and use, the said contract and an interest therein.

VI.

Because the said Circuit Court of Appeals erred in affirming the District Court in finding and adjudging that the appellant Baker did not acquire an assignment of said Tide Land Contract No. 728 covering Tide Land Block 430 from Sol G. Simpson in good faith and in the usual course of business, and in finding that a trust attached in favor of the Merchants' National Bank, its stockholders and cred-

itors, to the title acquired by the said Baker from the said Simpson.

VII.

Because the said Circuit Court of Appeals erred in affirming the District Court in finding and adjudging that the title acquired by the appellant Baker from the State of Washington to the said Tide Land Block 430 was in trust for the use and benefit of the insolvent Merchants' National Bank, its creditors and stockholders, and in holding that the title acquired by the appellant Water Front Realty Company was and is subject to said trust.

VIII.

Because the said Circuit Court of Appeals erred in affirming the District Court in finding and adjudging that the appellee's action was not, prior to its commencement, barred by lapse of time and laches.

IX.

Because the said Circuit Court of Appeals erred in affirming the District Court in finding and adjudging that appellee's action was not, prior to its commencement, barred by the statute of limitations of the State of Washington.

X.

Because the said Circuit Court of Appeals erred in affirming the District Court in including in the decree the harbor area lease adjacent to and in front of said Tide Land Block 430 purchased by Sol G. Simpson from the State of Washington after the appellant Baker had ceased to be receiver.

XI.

Because the said Circuit Court of Appeals erred in affirming the District Court in ordering the appellant, Seattle Water Front Realty Company, to hold said harbor area lease for the use and benefit of the appellee and to convey legal title to the appellee.

XII.

Because the said Circuit Court of Appeals erred in affirming the District Court in finding that the said harbor area lease was at any time a part of the trust of the Merchants' National Bank.

XIII.

Because the said Circuit Court of Appeals erred in affirming the District Court in finding and adjudging that the stock of the appellant A. S. Norton in the appellant Seattle Water Front Realty Company, which was issued to said Norton in consideration of an undivided 3% interest, purchased by said Norton from said Baker prior to the conveyance to said appellant Seattle Water Front Realty Company, was not a *bona fide* purchase by said Norton, and the Court erred in holding that said 3% interest was subject to said trust of the Merchants' National Bank and its receiver.

XIV.

Because the said Circuit Court of Appeals erred in affirming the District Court in finding and adjudging that the interest in the appellant Seattle Water Front Realty Company owned by A. S. Norton in the form of stock purchased by him after the formation of said company, and the interest in said

company owned by the Union Savings Bank & Trust Company of Seattle in the form of stock assigned to said company, is subject to the trust decreed by the Court in favor of the appellee.

XV.

Because the said Circuit Court of Appeals erred in affirming the District Court in admitting on the trial, over the objections of the appellants, that portion of the testimony of the witness Francis Rotch wherein it appears that the said Rotch, in answer to a question to state a conversation with Sol G. Simpson in 1890, testified:

"Mr. Simpson was turning a great many things over to me and of course I opened a great deal of his mail, unless it was marked Personal, and I came across a notice from the Land Commissioner saying that there was a payment due and interest due on Block 430 and so I went to Mr. Simpson and asked him whether I should pay it or not * * * . That was in the year 1900—the end of 1900. I have refreshed my memory about that. He said, 'Yes.' He said, 'Pay that.' He says, 'That belongs to Charlie Baker,' and then I said, 'Shall I pay it?' and he says, 'Yes, pay it.' And then I paid it and made the entry of it in my books and charged Mr. Baker with that payment, but that was all the conversation we had at that time as I remember it."

And after a further question, as follows:

"It came up again about two years later—I think 1902; I am not quite certain about that, and Mr. Simpson was hard up in those times. He had a good deal of property but did not have much money and

we had been selling off quite a lot of his property in order to obtain money, and I went to him again and I said: 'Now, can't we get rid of this Block 430?' I thought maybe at that time, probably he got it from Baker or something of the kind. He said, 'No,' Mr. Baker put that in my hands and I have to hold it in trust for him right along.' He said, 'We cannot dispose of that.' "

And further, in answer to a question by appellee's counsel:

"Q. Just the same, he told you in substance that he was carrying that property for Charlie Baker, or words to that effect?

"A. Yes, sir.

"Q. And that he never had any interest in it?

"A. Yes."

To all of which testimony, and the questions eliciting the same, objection was made at the time on the ground that the evidence was hearsay, immaterial and irrelevant.

XVI.

Because the said Circuit Court of Appeals erred in affirming the District Court in admitting on the trial the evidence of the witness Lester Turner over the objection of the appellants, that in 1898 or 1899 he, the witness, had a conversation with Sol G. Simpson as follows:

"The conversation came up in this way: I was talking to Mr. Simpson in regard to tide land holdings that the bank held. It owned quite a large amount of tide lands and he was director of the bank, and I talked to him about the plans of the bank and in

that connection I asked him about his own holdings down there. I knew that he held some tide lands. And he told me that a portion of those lands belonged to Charlie Baker—that he was carrying the title for him to accommodate him."

And also the following in response to a question as to a later conversation:

"I do not know the occasion of it—I do not remember the occasion of it, but it occurred in the bank. It was with reference in some way incidentally to the properties and I asked him how he came to hold the title to that property that belonged to Baker. 'Well,' he said, 'Baker did not want it known that he had taken the property while he was receiver of the bank and it might not bear investigation,' and he was carrying it for that reason."

Which testimony was objected to by appellants' counsel as hearsay, immaterial and irrelevant.

XVII.

Because the said Circuit Court of Appeals erred in affirming the District Court in rendering a decree in favor of the appellee, which decree is contrary to the testimony and against the law because the equity of the case entitled the appellants to a decree of dismissal.

WHEREFORE, the appellants and each of them pray that the said judgment be reversed and the District Court directed to dismiss the bill; and for

such other relief as the appellants and each of them are entitled to in equity.

B. S. GROSSCUP,
W. C. MORROW,
CORWIN S. SHANK,
H. C. BELT,
Solicitors for Appellants.

[Endorsed]: Assignment of Errors. Filed Apr. 5, 1915. F. D. Monckton, Clerk.

[Title of U. S. Circuit Court of Appeals and Cause Therein.]

Order Allowing Appeal [to Supreme Court U. S. and Fixing Amount of Bond].

IT IS HEREBY ORDERED that the appeal in the above-entitled cause to the Supreme Court of the United States and the supersedeas herein be and the same hereby is allowed as prayed and bond fixed in the sum of five thousand ($5,000) dollars, conditioned as the law directs.

Dated this 5th day of April, A. D. 1915.

WM. W. MORROW,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Order Allowing Appeal to Supreme Court U. S. and Fixing Amount of Bond. Filed Apr. 5, 1915. F. D. Monckton, Clerk.

[Title of U. S. Circuit Court of Appeals and Cause Therein.]

Appeal and Supersedeas Bond [on Appeal to Supreme Court U. S.].

KNOW ALL MEN BY THESE PRESENTS, that we, Seattle Water Front Realty Company, a corporation, Charles H. Baker and Algernon S. Norton, as principals, and the United States Fidelity & Guaranty Company, as surety, are each, jointly and severally, held and firmly bound unto John W. Schofield, as Receiver of the Merchants' National Bank of Seattle, the appellee in the above-entitled suit, in the just and full sum of Five Thousand Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we each, jointly and severally, bind ourselves, our successors, heirs, administrators and assigns.

Sealed with our seals and dated this 7th day of April, A. D. 1915.

The condition of this obligation is such that, WHEREAS, the appellants in the above-entitled cause have appealed to the Supreme Court of the United States to reverse the decree rendered and entered in the said cause in the United States Circuit Court of Appeals for the Ninth Circuit on the 15th day of February, A. D. 1915;

NOW, THEREFORE, if the said appellants shall ages and costs if they or either of them fail to make said appeal good, then this obligation shall be void; prosecute their appeal to effect and answer all dam-

otherwise to remain in full force and effect.

SEATTLE WATER FRONT REALTY COMPANY.

By CORWIN S. SHANK,
Its Solicitor Duly Authorized.

CHARLES H. BAKER.
By CORWIN S. SHANK,
His Solicitor Duly Authorized.

ALGERNON S. NORTON.
By CORWIN S. SHANK,
His Solicitor Duly Authorized.

UNITED STATES FIDELITY & GUARANTY COMPANY,

[Seal] By H. V. D. JOHNS,
Its Attorney in Fact.
By BRADLEY CARR,
Its Attorney in Fact.

The foregoing bond approved this 7th day of April, A. D. 1915.

WM. W. MORROW,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Appeal and Supersedeas Bond on Appeal to Supreme Court U. S. Filed Apr. 7, 1915. F. D. Monckton, Clerk.

[Title of U. S. Circuit Court of Appeals and Cause Therein.]

[Praecipe for Transcript of Record on Appeal to Supreme Court U. S.

To the Clerk of the said Court:

Sir: Please make and furnish me with a certified

printed Transcript of the Record (including the proceedings had in said Circuit Court of Appeals) and not less than thirty uncertified copies thereof for use on Appeal to the Supreme Court of the United States in the above-entitled cause, the said Transcript to consist of a copy of the following:

1. Printed Transcript of Record, on which the cause was heard in said Circuit Court of Appeals, to which will be added a printed copy of the following entitled proceedings that were had, and of the papers that were filed in said Circuit Court of Appeals, viz.:

2. Stipulation, filed Sept. 8, 1914, for Correction of Printed Record, etc.;

3. Order of Submission, entered Sept. 16, 1914;

4. Copy of Order of District Court Directing Transmission of Exhibits to Appellate Court, filed Sept. 21, 1914;

5. Certificate of Clerk, District Court, filed Sept. 21, 1914, Re Exhibits;

6. Order Directing Filing of Opinion and Recording of Decree, entered Feb. 15, 1915;

7. Opinion, filed Feb. 15, 1915;

8. Decree, filed and entered Feb. 15, 1915;

9. Petition for Appeal to Supreme Court, U. S., filed April 5, 1915;

10. Assignment of Errors, filed April 5, 1915;

11. Order Allowing Appeal, filed April 5, 1915;

12. Bond on Appeal;

13. Praecipe for Transcript of Record on said Appeal, filed;

14. Certificate of Clerk, U. S. Circuit Court of

Appeals to said Record;

15. Original Citation on Appeal.

Please prepare the thirty or more uncertified printed copies of said record by printing thirty or more copies of the above-mentioned proceedings that were had and papers that were filed in said cause in said Circuit Court of Appeals, and by binding one of the latter printed copies of said proceedings, etc., at the end of each of thirty or more extra copies of the printed Transcript of Record on which said cause was heard in said Circuit Court of Appeals.

Also please transmit to the Clerk of the Supreme Court along with the said transcript the original exhibits in said cause.

CORWIN S. SHANK,
Counsel for Appellants.

[Endorsed]: Praecipe for Transcript of Record on Appeal to Supreme Court U. S. Filed Apr. 16, 1915, F. D. Monckton, Clerk.

Service of the within Praecipe is hereby admitted this 13th day of April, 1915.

BAUSMAN, OLDHAM & GOODALE,
Attorneys for Appellee.

[Title of U. S. Circuit Court of Appeals and Cause Therein.]

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing four hundred and three (403) pages, numbered from and including 1 to and including 403, to be a true copy of the complete record made pursuant to the praecipe filed by counsel for the appellants on the sixteenth day of April, A. D. 1915, under Rule 8 of the Supreme Court of the United States, in the above-entitled case, including the Assignment of Errors on Appeal to the Supreme Court of the United States, and of all proceedings had, and of all papers, including the opinion, filed in the said Circuit Court of Appeals in the above-entitled case, as the originals thereof remain on file and appear of record in my office, and that the same, together with the accompanying original exhibits, viz.: Plaintiff's Exhibits Nos. 1 to 20, inclusive, and 22 to 33, inclusive, and Defendants' Exhibits "A" to "F," inclusive, "H" to "J," inclusive, "R" to "X," inclusive, and Nos. A–1 to A–11, inclusive, constitute the Transcript of Record on Appeal to the Supreme Court of the United States in the above-entitled cause as made and certified pursuant to the said praecipe.

ATTEST my hand and the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this seventh day of May, A. D. 1915.

[Seal] F. D. MONCKTON,
Clerk.

[Canceled U. S. Internal Revenue Documentary Stamp.]

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2438.

CHARLES H. BAKER, ALGERNON S. NORTON, and SEATTLE WATER FRONT REALTY COMPANY, a Corporation,

Appellants,

vs.

JOHN W. SCHOFIELD, as Receiver of the MERCHANTS' NATIONAL BANK OF SEATTLE,

Appellee.

Citation [on Appeal to Supreme Court U. S.]

United States of America to John W. Schofield, as Receiver of the Merchants' National Bank of Seattle, Greeting:

YOU ARE HEREBY NOTIFIED that in the above-entitled proceeding had in said United States Circuit Court of Appeals for the Ninth Circuit, an appeal has been allowed to the said appellants to the Supreme Court of the United States from the final decree entered in said cause, and you are hereby cited and admonished to be and appear in the said Supreme Court of the United States at the city of Washington, in the District of Columbia, sixty (60) days after the date of this citation, to show cause, if any there be, why the said final decree appealed from should not be corrected and speedy justice done in their behalf.

WITNESS the Honorable WILLIAM W. MORROW, a Circuit Judge of said court, this 5th day of April, A. D. 1915.

WM. W. MORROW,

Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

Copy of the foregoing citation received this 9th day of April, 1915.

BAUSMAN, OLDHAM & GOODALE,

Attorneys and Solicitors for said Appellee.

[Endorsed]: Citation on Appeal to Supreme Court U. S. Filed Apr. 16, 1915. F. D. Monckton, Clerk.

BRIEF OF APPELLANTS

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 472

CHARLES H. BAKER, ALGERNON S. NORTON, AND SEATTLE WATER FRONT REALTY COMPANY, APPELLANTS,

vs.

JOHN W. SCHOFIELD, AS RECEIVER OF THE MERCHANTS' NATIONAL BANK OF SEATTLE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Press of Pliny L. Allen Co., Seattle

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 472

CHARLES H. BAKER, ALGERNON S. NORTON, AND SEATTLE WATER FRONT REALTY COMPANY, APPELLANTS,

vs.

JOHN W. SCHOFIELD, AS RECEIVER OF THE MERCHANTS' NATIONAL BANK OF SEATTLE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 472

CHARLES H. BAKER, ALGERNON S. NORTON, AND SEATTLE WATER FRONT REALTY COMPANY, APPELLANTS,

vs.

JOHN W. SCHOFIELD, AS RECEIVER OF THE MERCHANTS' NATIONAL BANK OF SEATTLE.

BRIEF OF APPELLANTS

STATEMENT OF THE CASE.

This is an action brought by the present receiver of the Merchants' National Bank of Seattle, an insolvent national bank, against Charles H. Baker, a former receiver of the same bank and other defendants, who are the owners of certain real property in the city of Seattle, Washington, for a decree declaring the defendants to hold the said lands in trust for the plaintiff and to require a conveyance of the same.

The Merchants' National Bank of Seattle became insolvent in the summer of 1895, and the defendant Charles H. Baker was appointed receiver of that bank on June 19, 1895, and continued to act as such receiver up to April, 1899 (Tr. p. 3), when he was succeeded by A. W. Frater, who continued to act as receiver actively until July, 1901, (Tr. p. 168) and passively until February, 1913, (Tr. p. 4) when he was succeeded by the plaintiff. The creditors of the bank have received 52% of their claims (Tr. p. 172) and at present the plaintiff is without funds as receiver. All matters connected with the receivership have been fully closed up excepting this one matter, and all the records and correspondence of the receiver, excepting the journal and ledger, have been destroyed by the receiver Frater. (Tr. p. 172.)

The pieces of property in dispute in this action are block 430 of Seattle Tide Lands and the leasehold of the harbor area lying in front of that block. Block 430 is a tract of something over 12 acres, situate on the west side of the harbor (the side away from the business part of the city) about half a mile from the western shore of the harbor (Tr. p. 117), considerably over a mile from the southern shore and about 2 miles from the eastern shore. (Plaintiff's Exhibit 2.) Between it and the business part of the city are two navigable water-

ways, each 1000 feet wide. During all the times in question in this action it was covered by water at all stages of the tide and its value was purely speculative (Tr. p. 119), dependent upon the growth of the city of Seattle.

Under Chapter 178 of the Session Laws of 1895 of the State of Washington this property was classified as first class tide lands and pursuant to Section 54 of said act it was platted and appraised at $1488. (Tr. pp. 98 and 99.) The sections of this act that provided for the sale of this block were as follows:

Section 58. "The owner or owners of lands abutting or fronting upon the lands of the first class shall have the right for sixty (60) days following the filing of the final appraisal of the tide lands with the commissioner of public lands, to apply for the purchase of all or any part of the tide lands in front of the lands so owned."

Section 30. "The purchaser of land under the provisions of this act, except in cases where this act prescribes cash payment, shall enter into and sign a contract with the state, to be signed by the commissioner of public lands on behalf of the state, and in a form to be prescribed by the attorney general, in which he shall covenant that he will make the payment of principal and interest when due, and that he will pay all taxes and assessments that may be levied or assessed on such land. * * *"

Under this act the Merchants' National Bank prior to its failure had made application to pur-

chase a large tract of tide lands which included the block in question. (Tr. p. 209.) After the appointment of Charles H. Baker as receiver, the state board of land commissioners accepted this application as to a portion of the lands applied for, so that the state stood ready to sell to the receiver at its appraised value a tract of tide lands of about 70 acres, and accordingly Mr. Baker as receiver had in the name of the Merchants' National Bank entered into a contract with the state for the purchase of this land.

The contract for the purchase of this land (Tr. p. 104) was dated January 12, 1897, and purported to be made between the state of Washington, party of the first part, and the Merchants' National Bank of Seattle, King County, Washington, party of the second part. Under its terms the state agreed to sell block 430 of Seattle Tide Lands to the bank for $1488, subject to all liens for filling. The bank agreed to purchase and pay the said sum of $1488. in 10 annual installments and also all taxes and assessments that might be levied or assessed on the land, and if the bank should fail to pay any of the amounts either principal, interest, taxes or assessments when the same should become due and for six months thereafter, all rights of the bank under the contract might be forfeited at the election of the state board of land

commissioners without notice to the purchaser. This contract according to its terms was binding for and against the bank, its successors and assigns, but no assignment of the contract would in any way relieve the bank from the performance of the conditions upon its part unless it should be accepted by the commissioner of public lands. The receiver thereupon by letter dated January 26, 1897 (Tr. p. 98), notified the Comptroller of the Currency of this purchase, stating that "this right of purchase is a valuable asset of the trust and accordingly I respectfully ask you to ratify" the contract.

The Comptroller replied to this letter (Tr. p. 99) as follows: 'In view of your statement, you are hereby authorized to contract with the State for the purchase of the lands described in your communication, and, inasmuch as the contracts are assignable, they can no doubt be disposed of to advantage at any time, should such a course seem advisable."

The receiver made the first payment upon the contract on January 12, 1897, amounting to $148.80, and on March 1, 1897, made the second payment amounting to $148.80 principal and $10.72 interest. These were the only payments made on this contract out of receivership funds.

This block 430 was listed in the printed list of assets of the receivership which were for sale

(Tr. p. 224) and this list was circulated among the creditors of the bank and the public generally (Tr. p. 228), but the receiver up to the time of the sale hereinafter mentioned received no offer to purchase the contract for this property except an offer of one dollar. (Tr. p. 261.)

Upon October 6, 1897, the receiver filed a petition in the Circuit Court of the United States for the District of Washington, Northern Division, stating that he had in his hands as such receiver "a large amount of assets of his said trust, consisting of bills receivable, over-drafts, stocks, bonds, securities, warrants, and claims due upon the assessment levied upon the stockholders of said Bank by order of the Comptroller of the Currency, together with other personal and chattel property and evidences of indebtedness," which the receiver had been unable to realize upon, and asked permission to sell them at private sale. In accordance with the said petition, the court on October 6, 1897, made an order authorizing the receiver "to compromise, compound, or sell at private sale, all assets of said insolvent Bank which are in his judgment bad and doubtful, consisting of bills receivable, judgments, over-drafts, stocks, bonds, warrants, securities, assessments upon the stockholders of said Bank, and other personal and chattel property and evidences of indebtedness; for cash, for such sum

or sums as he, as such receiver, may be able to obtain, and as shall, in his judgment, be for the best interests of his said trust." No other order was entered which could be construed to authorize a sale of this block by the receiver.

Upon November 26, 1897, the receiver in the name of the Merchants' National Bank executed an assignment of the contract of purchase of said block 430 to S. G. Simpson for the expressed consideration of $198.80, which assignment was approved by the commissioner of public lands upon January 22, 1898. (Tr. pp. 108 and 109.) The receiver charged himself upon his journal with the amount received for this contract (Tr. p. 194) and reported the sale to the Comptroller of the Currency in his report for the quarter ending November 1897. (Tr. p. 200.)

It is claimed by the plaintiff and both the trial court and the circuit court of appeals found it to be a fact that this sale to Simpson was only colorable and that Simpson purchased this property and thereafter held it for Charles H. Baker the receiver. Mr. Simpson died about ten years ago and Mr. Baker positively denied that he at that time had any expectation of acquiring an interest in the property in question.

Mr. Simpson paid the third annual installment of principal and sold the contract to Mr. Baker

in March 1899 for what it had cost him. No written assignment, however, was made until August 11, 1905, when Mr. Simpson executed an assignment to the appellant Algernon S. Norton who took the property in trust for Charles H. Baker. Mr. Baker then paid the balance of the purchase price to the state and the deed was issued by the state to Mr. Norton. In 1907 the appellant, Seattle Waterfront Realty Company, was incorporated and this block was conveyed to it. The stock of this corporation was at the commencement of this action owned by 14 different persons, some of whom had paid a money consideration therefor. (Tr. pp. 175-179.)

While S. G. Simpson was the owner of block 430 he leased from the state the harbor area lying in front of this block. This however was an entirely separate transaction. Mr. Simpson assigned this lease to Mr. Norton at the time he assigned the contract and in turn Mr. Norton assigned the lease to the Seattle Waterfront Realty Company.

This action was begun in 1913, 15 years after the assignment of the contract from the receiver to Simpson, and more than 7 years after the issuance of the deed from the state of Washington to Norton, during all of which time the appellant corporation and its grantors had been paying all the taxes assessed against the property and no attempt had

been made by the receiver of the Merchants' National Bank to recover the same.

After the trial upon the merits the district court entered its decree wherein it adjudged that the assignment of the contract from the receiver to S. G. Simpson was fraudulent, null and void; that Algernon S. Norton in obtaining a deed to this property from the state obtained it as a trustee for the bank; that the lease to the harbor area was also the property of the bank and that S. G. Simpson held that lease as trustee for the bank; that the defendant Seattle Waterfront Realty Company, the present holder of the legal title to both the block of tideland and of the leasehold interest in the said harbor area should convey the same to the plaintiff upon being paid the sum of $10977.13, being reimbursement for all sums paid by the said realty company and its grantors upon the contract of purchase, taxes and rentals. From this decree the defendants appealed to the Circuit Court of Appeals for the 9th Circuit and the decree of the district court was affirmed by that court, from which affirmance an appeal is taken to this court.

SPECIFICATION OF ERRORS.

We respectfully submit that the decree of the district court was erroneous for the following reasons:

1. The contract made between the State and the Merchants National Bank by Charles H. Baker, its receiver, was *ultra vires* of both the bank and the receiver and on that account neither the bank nor its receiver can claim any rights thereunder.

2. The appellants are not estopped from raising the question of *ultra vires* in this case.

3. The contract being *ultra vires,* no duty rested upon Baker to carry the same out as receiver and, there being no duty resting upon him to perform the contract as such receiver, he cannot be held as a trustee by reason of having performed the contract personally for his own benefit.

4. The decree in this case, requiring as it does, in order to do equity to the defendants, that the plaintiff should pay out something over ten thousand dollars before acquiring title to this real estate, in effect permits a receiver of a national bank to make a speculative purchase of real estate and this is entirely beyond the powers of such an officer regardless of whether such a purchase is profitable or not.

5. On account of this sale not having been properly ordered by the circuit court it was therefore subject to attack from the beginning and its weakness being a matter of public record the plaintiff has been guilty of gross laches in permitting more than 15 years to elapse after the sale before bringing this action to set it aside.

6. The appellant realty company and its grantors having a good legal title to this property for more than 7 years, during which it has paid all taxes legally assessed thereon, its title therefore is unassailable under Section 789 of Remington & Ballinger's Annotated Codes and Statutes of Washington.

7. There was not sufficient evidence, particularly in view of the lapse of time, to justify the decision that the assignment to Simpson of the tide land contract was a breach of trust on the part of Mr. Baker.

8. All of the above points apply with peculiar force with respect to the harbor area lease.

ARGUMENT

I.

The contract made between the state and the Merchants' National Bank by Charles H. Baker, its receiver, was ultra vires of both the bank and the receiver and on that account neither the bank nor its receiver can claim any rights thereunder.

The contract for the purchase of this block was purely and simply a speculative purchase upon the part of the bank. Prior to the making of this contract the sole right that the bank had was merely the right to accept a statutory offer made by the state to sell to the bank at a price fixed by the officers of the state as the value of the property. The bank had no right, title or interest, legal or equitable, in the property. If before a contract had been entered into the legislature had repealed the act under which the tide lands were offered to the upland owners, all rights to purchase on the part of the upland owners would have ceased.

Allen v. Forrest, 8 Wash. 700.

Banning v. California, 240 U. S. 83.

The legal situation was exactly the same as if a private holder of real estate had approached the receiver and made him an offer to sell a piece of real estate at a bargain price.

The statute relating to the power of a national bank to purchase real estate is as follows:

"A national banking association may purchase, hold and convey real estate for the following purposes, and for no others:

First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years." III U. S. Compiled Stat., Sec. 5137; 13 Stat. at Large, 107.

The power of a receiver of a national bank in regard to the purchase of real estate is as follows:

"That whenever the receiver of any national bank duly appointed by the Comptroller of the Currency, and who shall have duly qualified and entered upon the discharge of his trust, shall find it in his opinion necessary, in order to fully protect and benefit his said trust, to the extent of any and all equities that such trust may have in any property, real or personal, by reason of any bond, mortgage, assignment, or other proper legal claim

attaching thereto, and which said property is to be sold under any execution, decree of foreclosure, or proper order of any court of jurisdiction, he may certify the facts in the case, together with his opinion as to the value of the property to be sold, and the value of the equity his said trust may have in the same, to the Comptroller of the Currency, together with a request for the right and authority to use and employ so much of the money of said trust as may be necessary to purchase such property at such sale.

"Sec. 2. That such request, if approved by the Comptroller of the Currency, shall be, together with the certificate of facts in the case, and his recommendation as to the amount of money which, in his judgment, should be so used and employed, submitted to the Secretary of the Treasury, and if the same shall likewise be approved by him, the request shall be by the Comptroller of the Currency allowed, and notice thereof, with copies of the request, certificate of facts, and indorsement of approvals, shall be filed with the Treasurer of the United States." III U. S. Compiled Stat., pp. 3514-15, Sections 1 and 2; 24 Stat. at Large, 8.

It cannot be claimed that the power to purchase this property can be derived from either one of these statutes.

The circuit court of appeals in its opinion upheld this transaction upon the theory that the bank obtained this right to purchase by reason of being owner of the upland adjacent to this property and therefore the bank, being already the owner of the upland, was empowered to buy the tideland lying

in front for the purpose of enhancing the value of the upland.

The only intimation of what this upland consisted of is contained in the list of real property made up by the receiver for general distribution. (Deft's Ex. A-2, p. 217). From this (p. 222) it appears that the bank owned two tracts, aggregating between 15 and 16 acres in Sec. 12, Twp. 24 N. R. 3 East W. M. This upland ownership of 15 acres was sufficient to give any owner who could purchase the preference right to purchase all of the 70 acres of tide land lying between it and the West Waterway except what had been theretofore improved by other parties. A glance at the map will show that this Block 430 lies over half a mile from the upland and that between it and the upland are three streets (one of which is 250 feet wide) and Block 431 (which the receiver did not purchase), while a line drawn from the upland in a northerly direction would intersect the harbor area within less than a quarter of a mile. The reason given by the receiver for making the sale, and the comptroller for approving it was that the contract was assignable and "could be disposed of to advantage at any time." There is not the slightest claim anywhere in the record that the value of the upland was enhanced in the slightest by reason of this block of tide lands being under

the same ownership, and it would take the wildest imagination to discover any connection whatever between the two pieces of property.

The plaintiff has further attempted to uphold this contract upon the theory that as owner of the upland the bank had an interest in the tideland which it was legally entitled to protect. This theory, however, is entirely opposed to the decisions both of this court and of the supreme court of the State of Washington.

Banning v. California, 240 U. S. 83.

Shively v. Bowlby, 152 U. S. 1.

In *Eisenbach v. Hatfield,* 2 Wash. 236, 253, the supreme court of the State of Washington used the following language:

"The result of our investigation of the authorities leads us to the conclusion that riparian proprietors on the shore of the navigable waters of the state have no special or peculiar rights therein as an incident to their estate."

In *Harbor Line Commissioners v. State,* 2 Wash. 530, 533, the court used the following language:

"The court is still of the opinion that, as against the state, a littoral owner, simply as such owner, can assert no valuable rights below the line of ordinary high tide."

The legislature of Washington gave to a certain class, a 60 day option to purchase its tide lands.

The federal law disqualified the bank from becoming a purchaser. It was disqualified from membership in the class.

To get a true view of this contract, let us get away from the glamor of increasing values and suppose the opposite. Let us suppose that the receiver had been absolutely unable to dispose of these contracts at any price, and that, at the expiration of ten years, the state had tendered to the receiver a patent for the tide lands (then of no market value) and demanded payment of the purchase price. Would such a claim be enforced against the trust?

The limits of the power of a national bank to purchase real estate and of a receiver to consummate such a purchase are expressly set forth in the statutes hereinbefore quoted, and they do not include the purchase outright for purely speculative purposes of a block of tide lands, however attractive the price and terms might be, and the fact that now, after a lapse of 15 years, it is plain that it would have been immensely profitable for the trust to have completed those purchases does not make them legal or *infra vires.*

Both the district court and the circuit court of appeals in deciding this point against the defendants have evidently relied upon a line of cases decided in this court beginnng with *Union National*

Bank v. Matthews, 98 U. S. 621, and including the cases which follow its authority:

Jones v. N. Y. Guaranty & I. Co., 101 U. S. 622.

National Bank of Genessee v. Whitney, 103 U. S. 99.

Fortier v. New Orleans Nat. Bank, 112 U. S. 439.

Logan County Nat. Bank v. Townsend, 139 U. S. 67.

Thompson v. St. Nicholas Nat. Bank, 146 U. S. 240.

Kerfoot v. Farmers & M. Bank, 218 U. S. 281.

The first of this line of decisions, the *Matthews* case, arose out of a suit brought by the maker of a trust deed which had been given to secure a note executed to a commercial corporation and assigned to a national bank. The maker of the trust deed claimed that this trust deed was void and unenforcible for the benefit of the bank and sought to enjoin a sale thereunder. This court held that it was a violation of the national banking act for a bank to make a loan upon real estate security, but that as the loan had been made the violation of the law was already complete and in the absence of a provision in the law making the security void in the hands of the bank, the court would not interpret the act to provide for any such forfeiture.

In the *Kerfoot* case, it was held that a deed to a national bank could not be avoided by the grantor or his heirs for want of legal authority in the bank to hold title. It was a trust title but the case apparently did not turn on that point. It was held on settled precedent that the grantor of real estate to a national bank can not avoid the title in the bank on account of limitation of power to *acquire* real estate.

Applied to the case at bar, the deed by the state could not be challenged *by the state* no matter where the title is now lodged. But while the transaction was executory it was voidable by either party, at least on restoration to the other party of the consideration paid.

In the case at bar novation of the executory contract was accomplished by the assignment to Simpson, the acceptance of that assignment by the State, by which Simpson was substituted for the receiver as contracting party, and restoration to the trust estate of the money used to make the first two of the ten annual payments.

This action is to set aside that novation by which a competent party took the place of a party incompetent to make a binding executory engagement to pay for the land according to the terms of purchase.

The defendant, Waterfront Realty Company, holds as the grantee of the State. It and its grantors paid to the State directly the last eight payments and by reimbursement the first two payments, making the whole consideration for the purchase. The title does not represent the proceeds of money belonging to the insolvent bank. It can not be claimed by the receiver as a resulting trust. The case is not prosecuted on that theory. Since the grantor is not repudiating any act on which the title rests, the *Matthews* and cases following it have no application.

This court has frequently held that any engagement of a national bank beyond its corporate powers will not be enforced by the courts. To hold that one party is estopped to repudiate for that reason while the other is not, would destroy the principle of reciprocity. It follows that either party to an executory contract may plead *ultra vires* in an action for its enforcement.

Central Trans. Co. v. Pullman's Palace C. Co., 139 U. S. 24.

Thomas v. West Jersey R. R. Co., 101 U. S. 71.

Pennsylvania R. R. Co. v. St. Louis, A. & T. R. Co., 118 U. S. 290.

Oregon R. & N. Co. v. Oregonian Ry. Co., 130 U. S. 1.

Pearce v. Madison & Indianapolis R. Co., 62 U. S. 441.

McCormick v. Market Nat. Bank, 165 U. S. 538.

California Nat. Bank v. Kennedy, 167 U. S. 362.

First Nat. Bank of Concord v. Hawkins, 174 U. S. 364.

First Nat'l. Bank v. Converse, 200 U. S. 425.

Merchants Nat. Bank v. Wehrmann, 202 U. S. 295.

DeLaVergne R. M. Co. v. German Sav. Inst'n. 175 U. S. 40.

Case v. Kelly, 133 U. S. 21.

In the case last above cited the receiver of a corporation was seeking through the aid of the court to acquire title to various pieces of real estate which the corporation was incompetent under its charter to acquire, but the owners of the real estate raised the question of *ultra vires* and the opinion of the court contains the following language:

"It is next objected to the principle adopted by the court that the limitation upon the power of the corporation to receive land is one which concerns the State alone, and the title to such lands in a corporation can only be defeated by a proceeding in the nature of a *quo warranto* on behalf of the State. The case of *Union Nat. Bank v. Matthews,* 98 U. S. 621, is strenuously relied on to support this view. We need not stop here to inquire whether this Company can hold title to lands, which it is impliedly forbidden to do by its charter, because the case before us is not one in which the title to the lands in question has ever been vested in the Railroad Company or attempted to be so vested.

The Railroad Company is plaintiff in this action, and is seeking to obtain the title to such lands. It has no authority by the Statute to receive such title and to own such lands, and the question here is, not whether the courts would deprive it of such lands if they had been conveyed to it, but whether they will aid it to violate the law and obtain a title which it has no power to hold. We think the questions are very different ones, and that while a court might hesitate to declare the title to lands received already, and in the possession and ownership of the Company, void on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the Company in violating the law, and enabling the Company to do that which the law forbids."

National Bank v. Whitney, 103 U. S. 99, is an express notice by this court that the doctrine of the *Matthews* case will be limited to securities on the faith of which national banks have already parted with their money. Nowhere has this court countenanced the proposition as applicable to an executory contract involving a continuing or future obligation of a national bank. The policy behind the Banking Act was the protection of stockholders and depositors against real estate speculation. Where a bank has paid out its money on real estate mortgage security to hold the mortgage void would penalize without benefit. To hold that an obligation to pay money in the future for a real estate purchase can be annulled only by the government,

practically denies to stockholders and depositors the protection of the law and would open the door to unlimited speculation.

The *Matthews* and *Whitney cases* hold that a mortgagor who has received the consideration for his debt cannot deny the validity of his mortgage and resist its foreclosure. But suppose a national bank enters into a contract to make a future loan on real estate mortgage security, would that contract be enforced in an action for specific performance, or could the bank be mulcted in damages for its breach?

In the *Kennedy, Hawkins* and *Converse* cases above cited national banks had become the owners of corporate stocks and these suits were brought to enforce the liability of a stockholder against these banks. In the *Kennedy* case this court used the following language:

"The circumstance that the dealing in stocks by which, if at all, the stock of the California Savings Bank was put in the name of the California National Bank, was one entirely outside of the powers conferred upon the bank, and was in nowise the transaction of banking business or incidental to the exercise of the powers conferred upon the bank, distinguishes this case from the class of cases relied upon by the defendant in error. *National Bank v. Whitney,* 103 U. S. 99; *Union Nat. Bank v. Matthews,* 98 U. S. 621. The difference between those cases and one like this was referred

to in *McCormick v. Market Nat. Bank,* 165 U. S. 538, and it is therefore unnecessary to particularly review them. The claim that the bank in consequence of the receipt by it of dividends on the stock of the savings bank is estopped from questioning its ownership and consequent liability is but a reiteration of the contention that the acquiring of stock by the bank under the circumstances disclosed was not void but merely voidable. It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction being absolutely void could not be confirmed or ratified. As was said by this court in *Union P. R. Co. v. Chicago, R. I. & P. R. Co.,* 163 U. S. 564, speaking through Mr. Chief Justice Fuller, p. 581:

"'A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced or rendered enforceable by the application of the doctrine of estoppel.'"

In the *Hawkins* case the decision in the *Kennedy* and other like cases was affirmed with the expression that it was sufficient "to cite those decisions without undertaking to fortify the reasoning and conclusions therein reached."

In the *Converse* case a national bank upon a reorganization of a manufacturing company exchanged its claim against the old company for stock in the new company. Upon the national bank being sued upon a liability as a stockholder in the new company the bank raised the question of *ultra vires.*

The plaintiff sought to combat this claim upon the theory that the bank had taken this stock as an incident of securing a present loan of money, but this court called attention to the fact that the Supreme Court of Minnesota (from which the writ of error had been taken) had decided that the new corporation was a purely speculative business and this court thereupon decided that a national bank could not engage in a speculative enterprise for the purpose of securing a present loan of money or even as a means of protecting itself from loss upon a pre-existing indebtedness, saying:

"The power of a national bank to engage in the character of business which the articles of association of the thresher company manifested, as defined by the supreme court of Minnesota, cannot be inferred to have been possessed by the bank as an incident of securing a present loan of money, or as a means of protecting itself from loss upon a pre-existing indebtedness. To concede that a national bank has ordinarily the right to take stock in another corporation as collateral for a present loan or as a security for a pre-existing debt does not imply that, because a national bank has lent money to a corporation, it may become an organizer and take stock in a new and speculative venture; in other words, do the very thing which the previous decisions of this court have held cannot be done.

"The speculative venture, therefore, which the bank undertook, as held by the Minnesota court, when it engaged in taking the stock in the thresher company, being *ultra vires*, it follows, under the

settled rules hitherto applied by this court, that the bank, despite the subscription, was entitled to plead its want of authority as a defense to the claim of the receiver."

In the *McCormick* case a national banking association had made a lease before it had received from the comptroller of the currency the certificate authorizing it to do business. Upon being sued upon this lease the association set up the defense that the lease was *ultra vires*. This court said:

"The lease sued on having been executed by the defendant, contrary to the express prohibition of the statute, which peremptorily forbade the corporation to transact any business, unless to perfect its organization, and thus denied it the capacity of entering into any contract whatever except in perfecting its organization, the lease is void, cannot be made good by estoppel, and will not support an action to recover anything beyond the value of what the defendant has actually received and enjoyed."

In the case at bar the lower court decreed that the lease taken out by Simpson, while he held the tide land contract, for the adjacent harbor area, is in equity the property of the trust estate. Baker paid Simpson $2000.00 for this lease and assumed the annual rent to the State for thirty years. This rental is a personal obligation to the state from which no court has power to relieve the defendant. Will this court impose upon the trust of the present receiver this obligation running for the next twenty

years? The effect of the decree appealed from is to compel the defendant to sell this lease to the trust at the price paid, with subsequent charges and interest, thus enabling the receiver, through the aid of the court, to consummate a transaction forbidden by statute.

The case however which comes the closest in its facts to the present case is the case of *Merchants Nat. Bank v. Wehrmann,* 202 U. S. 295. In that case the Merchants National Bank had taken as security for a debt, and afterwards in satisfaction of a debt, a 9|40 interest in a partnership formed to purchase, improve, divide into lots and sell a leasehold interest. Upon action being brought upon the theory that the bank was liable for the debts of the co-partnership, the bank raised the claim that the transaction was *ultra vires* of it and therefore no liability to it accrued. This court used the following language:

"It is not necessary in this case to say that shares like the present could not be accepted as security in any form by a national bank. But such a bank cannot accept an absolute transfer of them to itself. It recently has been decided that a national bank cannot take stock in a new speculative corporation, with the common double liability, in satisfaction of a debt. *First Nat. Bank v. Converse,* 200 U. S. 425. *A fortiori,* it cannot take shares in a partnership to the same end."

If a national bank is not empowered to take in satisfaction of a debt a share in a partnership engaged in the speculative handling of real estate, it is all the more certain that it is absolutely beyond its power to enter into a contract for a speculative purchase of real estate upon its sole responsibility.

The contract to purchase therefore in this case being absolutely *ultra vires,* no right of action exists thereon either for or against the bank.

II.

The appellants are not estopped from raising the question of ultra vires in this case.

It is claimed that Mr. Baker having entered into this contract and having used trust funds in carrying it out, has thereby estopped himself and all persons claiming under him from asserting that it would have been illegal to continue to use trust funds in further performance of the contract. In order to see how this principle would work out in practice, let us put ourselves in the situation of the receiver at the time he sold this contract to Simpson. The receiver had entered into a contract in which he had attempted to obligate his trust to pay the principal sum of $1488. upon a speculative purchase of real estate, besides interest, taxes and cost of filling. He had already paid upon

this contract out of the trust funds in his hands the sum of $308.32. Was he, by reason of these actions, (clearly illegal), under any obligation, moral or legal, to continue in his illegal course of procedure? Was it not his clear duty to obtain restoration to the trust of the funds that he had used illegally and get rid of the entire matter?

But it is asserted, Mr. Baker and his associates, having used this very contract in obtaining title to this property from the state are thereby now estopped from asserting that it was illegal.

In holding that the defendants were estopped to deny the validity of the contract of purchase the lower courts overlooked two rules of law that are clearly established: (1) a contract *ultra vires* of a corporation can never be made *infra vires* by estoppel, and (2) an estoppel *in pais* operates only in favor of a person who has been misled to his injury and he only can set it up.

(1) Whatever the rule may be in some of the state courts, this court has always rigidly adhered to the rule that: "A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced or rendered enforceable by the application of the doctrine of estoppel."

Union P. R. Co. v. C. R. I. & P. R. Co., 163 U. S. 564, 581.

California Nat. Bank v. Kennedy, 167 U. S. 362, 371.

First National Bank v. Hawkins, 174 U. S. 364, 370.

Central Trans. Co. v. Pullman's Palace C. Co., 139 U. S. 24.

McCormick v. Market Nat. Bank, 165 U. S. 538, 553.

Ward v. Joslin, 186 U. S. 142.

(2) Let us analyze the situation and see if any equitable estoppel can be deduced therefrom. The receiver of the bank held the promise of the State to convey this land. He could not enforce this promise by reason of its being *ultra vires.* He could not even comply with the terms thereof without a wrongful diversion of trust funds. He dealt with his assignee (the defendants' grantor) Mr. Simpson on the assumption that the contract was valid and binding. Mr. Simpson and Mr. Baker dealt with the State upon the same assumption, and the State, upon receiving full payment of the purchase money, conveyed the property described in the contract to the then holder of it. It is true, this has resulted in benefit to Mr. Baker and his associates, but wherein have the depositors in the defunct bank been injured?

In *Thompson v. Sioux Falls Nat. Bank,* 150 U. S. 231, a national bank had without any consideration therefor given to a county treasurer a cashier's

check with the fraudulent intent that the treasurer should exhibit this check to the board of county commissioners as so much cash in his settlement with the board and then return the check. Instead however of returning the check, the county treasurer endorsed it and passed over the possession of it and suit was thereupon brought upon this check. The bank defended upon the ground that no value had been given upon the check. Upon the claim of the holder of the check that the bank was estopped by its fraudulent conduct to deny that the bank was indebted to the county in the amount of such check, this court said:

"The claim that defendant was estopped by its cheque to deny that the bank was indebted to the county in the amount of such cheque, depends practically upon the same considerations as the question of innocent purchaser. If, upon the faith of such representations, the county commissioners did any act prejudicial to the interests of the county, an estoppel might arise; but if, before such act was done, the commissioners were informed that the cheque was fictitious, they could not be said to have acted upon the faith of its representation, and there could be no estoppel."

If a bank which has passed out of its possession its negotiable paper for the express purpose of being used fraudulently is not thereby estopped from denying the validity of the check, most certainly a party who has in good faith assumed that

a contract was a valid contract is not estopped from afterwards asserting its invalidity against a party who has been in no manner injured by the previous assumption of the validity of the contract.

III.

The contract being ultra vires, no duty rested upon Baker to carry the same out as receiver and, there being no duty resting upon him to perform the contract as such receiver, he cannot be held as a trustee by reason of having performed the contract personally for his own benefit.

A constructive trust is grounded on a breach of duty, by a fiduciary person with respect to the property of the *cestui que trust*. The two essential elements are "property" and "breach of duty." Without property there is nothing in trust, nothing to care for, nourish and support. Property may grow and accumulate in the hands of the trustee. It is his duty to make it do so as far as possible, but his fiduciary relation begins when there comes into his care some material thing or some vital right, and extends only to such material thing or vital right and its increase.

If the right to purchase this Block 430 never existed in the insolvent national bank, then no such right came into the hands of receiver Baker by virtue of the bank's application prior to the receivership. If the bank had not engaged upon this un-

lawful speculation it would have had no pending application when Baker took over its assets. If Baker as receiver had complied with the law he would have dropped the application. It was but a scrap of paper.

Baker's contract with the State for this block of land was in substance his personal contract from the beginning. It is familiar law that when an agent engages to do a thing beyond his authority, the engagement is his own unless the principal adopts the act. In this case the principal was without power to adopt or ratify, so that the act became personal, though done in the principal's name.

The lower courts have said that even if there was no vital germ in the trust estate from which this property has grown into material being, title has been acquired through Baker's personal efforts and expenditures while receiver.

We have seen that two payments wrongfully diverted from the trust estate were returned through the sale to Simpson. The trust was entitled to Baker's personal services only in so far as they related to the trust property. He had a right to the proceeds of his personal endeavor outside the receivership, and if this tide land application was not a vital right in the receivership, it could not be brought in by his illegal acts.

"Breach of Duty." But it is contended Baker profited by this transaction and that fact alone makes him a wrongdoer. The error lies in the hypothesis that all "wrong doing" amounts to a "breach of duty." The trust estate never had the property in controversy, or the right to acquire it; no duty devolved on the trustee to acquire it illegally. If through mistake he wrongfully used trust money, he was personally liable therefor, or at most, for its proceeds until it was repaid. Repayment ended the trust in the proceeds and the situation legally and morally was the same as if no unlawful purchase had ever been attempted. If as an incident of his wrongful act in attempting to make this purchase, and the correction of that wrong by securing a restoration of the money diverted for which he was liable, the contract became personal, it is as immaterial now that profit has resulted as if loss had followed. The whole point summed up goes back to the proposition that the insolvent bank never had the right to acquire this property. It therefore lost nothing by the receiver's conduct and no property right in the form of a constructive trust can be germinated where there never was a germ to start with, or breach of duty to nurture it. Both elements of the proposition on which the case rests are wanting.

Ordinarily it is the duty of the trustee to hold the trust property until a valid sale is made. Here

it was the paramount duty of the receiver to get rid of this contract. In the language of *Thomas v. R. R. Co., supra,* quoted many times by this court, it was the duty of the receiver "having entered into the agreement * * * to rescind or abandon it at the earliest moment. * * * Though they delayed its performance for several years, it was, nevertheless, a rightful act when it was done. Can this performance of a legal duty, a duty both to stockholders of the Company and to the public, give to plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that this can be done is, in our opinion, to hold that any act done under a void contract makes all its parts valid, and that the more you do under a contract forbidden by law, the stronger the claim to its enforcement in the courts."

In *Garrow v. Davis,* 15 How. 272, the complainants were the assignees of the vendees in a contract of purchase of real estate. All their rights to a legal enforcement of the contract had been lost by failure to make the stipulated payments and there remained only the moral claim (which is frequently recognized in such cases) to a right to purchase and apply a portion of payments already made on the purchase price, just as here, the right

of the bank was not an enforcible right, but a transaction that was merely acquiesced in by the officers of the State. In the *Garrow* case, the complainants employed one Paulk to realize as much out of the good will of their contract as he could. The court said:

"To dispose of it, they employed the defendant, Paulk. If they have been defrauded, in its sale, by the defendants, they are entitled to relief; but in the lands themselves they had no interest, and did not intend, by Paulk's agency, to acquire any; and if all the fraud charged in the bill was perpetrated, it affected not any title of theirs to the land, or any negotiation for its acquisition, but solely the compensation which they might otherwise have obtained for Black's good will towards them, as the holders of the expired contracts. This was the only subject matter upon which the alleged fraud could operate."

In *Case v. Kelly,* 133 U. S. 21, (heretofore cited upon another point) the receiver of a railroad company brought suit against former officers of the company to compel conveyance of certain lands which had been donated during the construction of the road by "citizens who were interested in the construction of the road," and which were intended by the donors "to be for the use and benefit of the Railroad Company, and to assist it in such construction." The fundamental allegations of the bill were "that these defendants, representing to the persons who made the donations that they were

officers of the road, and soliciting these grants for the benefit of the road, took the conveyances to themselves individually; that they did this in a fraudulent manner, by making the grantors in the conveyances believe that they, as the officers of the company, could receive the conveyances for the benefit of the road, and that either the grantors did not really know to whom the conveyances were made, or were induced to believe that when made the grantees held the lands as a trust for the benefit of the road." The lower court there found that the conveyances in question "were made by the grantors and received by the defendants as contributions to the Railroad Company to aid in the construction of its road; and that if the Railroad Company had authority by law to receive such grants and to hold such real estate, it would be entitled to the relief sought." But being further of the opinion that under its charter and the laws of the state of its domicile, the corporation could only receive and hold lands for the defined purposes of the road, the lower court entered decree for the conveyance of only such portions of the real estate in question as were found to be "necessary and proper to the road for its use in the way of track, right of way, depots and other similar, proper and necessary uses." That case was a much stronger case for the complainants than ours, as in that case

the sole consideration of the conveyances was the construction of the road and the grantees had fraudulently represented at the times of taking the conveyances that they were taking them as trustees for the company, but this court concluded its opinion as follows:

"We are urged to consider that if this decree is affirmed, dismissing the bill of the Railroad Company, the defendants will be left in the possession of property fraudulently acquired, of considerable value, for which they gave no consideration. The answer to this is, that such a question cannot be raised by the plaintiff in this case, because, having no right to take the property, it is not injured by a decree of the court which fails to grant such right. The other questions must be between the defendants in this case and those from whom they took deeds of conveyance, or such other parties, public or private, as may show that they have an interest in the controversy."

IV.

The decree in this case, requiring as it does, in order to do equity to the defendants, that the plaintiff should pay out something over ten thousand dollars before acquiring title to this real estate, in effect permits a receiver of a national bank to make a speculative purchase of real estate and this is entirely beyond the powers of such an officer regardless of whether such a purchase is profitable or not.

A principle of equity which was recognized by the trial court in this cause is that where a party is declared by the court to be a trustee in a con-

structive trust he is entitled to be reimbursed for all money disbursed as purchase money, taxes and the like before being required to convey. The court found that the amount in this case which the plaintiff should pay to the defendants as a consideration of the transfer was $10,977.13. A portion of this sum was money paid to the state as the purchase price of the land.

The present receiver testified "that as receiver of the Merchants' National Bank no funds had come into his hands, and that at the present time he is without funds, and that there are no assets of the bank so far as he knows excepting the claim which he is asserting in this action." (Tr. p. 190.)

We need go no further than the testimony of the receiver himself to definitely prove that he is without funds with which to pay this judgment, consisting of the payments that were made to the state and the taxes upon this property. We are then brought to the question of considering whether, if any creditors, stockholders, or other parties, who are speculating at the expense of the Comptroller of the Currency and of the receiver in this litigation, were to give the receiver this money, the receiver could use that money for this purpose? We are presenting to the court under another head in this brief the power of the receiver to utilize funds in making purchases or payments contrary to the provisions

of the statute. Any funds that might be contributed by people speculating in this law suit would become subject to the provisions of the law prescribing the extent to which these funds might be used for a purpose of this character. If the receiver could not have made the payments to the state from year to year out of the funds in his hands as these payments became due to the state, then certainly he cannot use the funds to reimburse another for having made these payments.

This becomes at the present moment even more of a question than ever before. Up to one year ago the title to Block 430 was subject to any lien or liens that might arise or be created in consequence of or pursuant to the provisions of the act of the legislature of the State of Washington providing for the filling of these tide lands. This filling was completed in the summer of 1913 and the certificates for this filling which are liens upon this properety aggregate $79,352.76. (Tr. p. 211.) Hence any money that the receiver might pay whether it was his own or presented to him by speculators would be paid out under order of the court upon property subject to a lien of nearly $80,000.

The circuit court of appeals was of the opinion that this defense is not available to the defendants saying: "This court will presume that the money will be paid into the court below for the defendants

as directed by the decree." Is this court going to presume that a trustee is going to violate the terms of his trust by applying funds belonging to the trust to a purpose unauthorized by law? Is this court going to affirm a decision which can only become effective through one of the parties committing an act in direct conflict with the federal statute? Such an idea is entirely opposed to the theory of the standing of illegal contracts in court. If this court affirms this decision, it thereby puts its stamp of approval upon a proposition whereby a receiver of a defunct national bank becomes an owner of a speculative piece of real property and pays therefor something over $10,000. The only redeeming feature that can be adduced to save the proposition is that the lower court has found as a fact that the property is worth considerably more than this:—in other words that it is a good speculation. Is this court going to lay down the rule that a good buy will justify a receiver of a national bank in using the trust funds for speculative purchases?

V.

On account of this sale not having been properly ordered by the circuit court it was therefore subject to attack from the beginning and its weakness being a matter of public record, the plaintiff has been guilty of gross laches in permitting more than fifteen years to elapse after the sale before bringing the action to set it aside.

The assignment from Mr. Baker as receiver to Mr. Simpson was made on November 26, 1897. When Mr. Baker had entered into this contract with the commissioner of public lands for the purchase of these lands he made entry thereof upon his journal (Tr. p. 191) and reported the same to the comptroller of the currency. (Tr. pp. 98 and 99). The list which the receiver made up of all of the real property belonging to the estate and circulated among the depositors and the public generally, showed this block to be an asset of the estate. (Tr. p. 224). The sale was entered upon the receiver's journal (Tr. p. 194) and reported to the Comptroller in the receiver's quarterly report. (Tr. p. 200.) Mr. Frater when he assumed the receivership in April 1899 knew that all of the tidelands (including this block) had been sold. Mr. Frater finally wound up the affairs of the receivership about the 1st of July, 1901, so that at that time every one interested in the conduct of this receivership knew that all of the assets of the trust including this block had been disposed of in some manner. No order of the circuit court had been entered specifically authorizing this sale (Tr. p. 120) and this was a matter of record in the city where the receivership had been carried on. It was accessible to any one interested in the receivership.

During the lapse of time from the assignment

of this contract in 1897 until the commencement of this action in 1913, Mr. Simpson and his successors in interest paid interest and principal upon the purchase price of this contract amounting to over $1,000. and paid taxes and other necessary expenses in caring for and preserving the property, making a total outlay upon the property of over $10,000. In the meantime neither the receiver nor any one else interested in the trust ever questioned the validity of the sale. Fifteen years afterwards, however, the comptroller of the currency claims that this sale (which was subject to attack when made for a reason that was apparent on the face of the record) was void for the further reason of the personnel of a secret grantee and thereupon this suit was brought to recover the property.

In discussing the question of laches both the plaintiff and the circuit court of appeals appear to see only the fact that Mr. Baker's interest in this property had been concealed from the public at large, but they overlook the other fact which was apparent upon the face of the record that the sale to Mr. Simpson was subject to attack at the time it was made because not ordered by the circuit court, and this fact was easily ascertainable by any one who cared to examine the records of the local circuit court. On the question of laches, what matters it that one reason for setting this sale aside was un-

known to the parties interested during this time? Another reason for setting the sale aside was well known to, or could have been easily ascertained by, every one interested and if at any time before the issuance of the deed by the State to Mr. Norton, the receiver or any one interested adversely to Mr. Norton and Mr. Baker had called the attention of the state officials to the fact that the assignment from Mr. Baker to Mr. Simpson had not been ordered by the circuit court, the State's officers would doubtless have refused to issue the patent until an adjudication had been had upon the validity of the assignment.

No one however saw fit to question this assignment, but permitted the defendants to continue investing their money in this property so that now when it appears to have been a good investment the present owners are faced with a law suit wherein is brought into question an assignment made 15 years ago of an executory contract of purchase, which assignment could have been attacked at any time by merely setting up only two facts which were facts of public record—the assignment and the lack of any court order.

This court has many times discussed the question of laches, and we quote from a few of the opinions rendered in this court as follows:

"The law is well settled that, where the question of laches is in issue, the plaintiff is chargeable

with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put upon a man of ordinary intelligence the duty of inquiry. This principal was applied at the present term of this court in *Foster v. Mansfield, C. & L. M. R. Co.*, 146 U. S. 88, to a case where a stockholder in a railway company sought to set aside a sale of the road which had taken place ten years before, when the facts upon which he relied to vacate the sale were of record and within easy reach. See also *Wood v. Carpenter*, 101 U. S. 135, 141; *Kennedy v. Green*, 3 Myl. & K. 722; *Buckner v. Calcote*, 28 Miss. 432; *Cole v. McGlathry*, 9 Me. 131; *McCown v. Whitmore*, 31 Me. 448.

"The duty of inquiry was all the more peremptory in this case from the fact that the property of itself was of uncertain character, and was liable, as is most mining property, to suddenly develop an enormous increase in value. This is actually what took place in this case. A property which, in October, 1880, plaintiff sold to Chatfield upon the basis of $4800. for the whole mine is charged, in a bill filed October 21, 1887, to be worth $1,000,000., exclusive of its accumulated profits. Under such circumstances, where property has been developed by the courage and energy and at the expense of the defendants, courts will look with disfavor upon the claims of those who have lain idle while awaiting the results of this development, and will require not only clear proof of fraud, but prompt assertion of plaintiff's rights. *Felix v. Patrick*, 145 U. S. 317, 334; *Hoyt v. Latham*, 143 U. S. 553, 567; *Hammond v. Hopkins*, 143 U. S. 224; *Great West Min. Co. v. Woodmas of Alston Min. Co.* 14 Colo. 90.

"The language of Mr. Justice Miller in *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, 592, with re-

gard to the fluctuating value of oil wells, is equally applicable to mining lodes: 'Property worth thousands to-day is worth nothing to-morrow; and that which to-day would sell for a thousand dollars at its fair value, may, by the natural changes of a week or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit.' "

Johnston v. Standard Mining Co., 148 U. S. 360.

"In cases of concurrent jurisdiction, courts of equity consider themselves bound by the statutes of limitation which govern courts of law in like cases; and this rather in obedience to the statutes, than by analogy. In many other cases they act upon the analogy of the limitations at law; as where a legal title would in ejectment be barred by twenty year's adverse possession, courts of equity will act upon the like limitation, and apply it to all cases of relief sought upon equitable titles, or claims touching real estate.

"But there is a defense peculiar to courts of equity, founded on lapse of time and the staleness of the claim, where no statute of limitations directly governs the case. In such cases courts of equity often act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting rights, or long acquiescence in the assertion of adverse rights. (2 Story Eq., sec. 1520.)

"A court of equity will not give relief against conscience or public convenience where a party has slept upon his rights. 'Nothing,' says Lord Camden (4 Bro. Ch. R. 640,) 'can call forth this court into activity but conscience, good faith, and reasonable diligence; when these are wanting, the court is passive, and does nothing.' Length of time necessarily obscures all human evidence, and deprives parties of the means of ascertaining the nature of original transactions; it operates by way of presumption in favor of the party in possession. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the Chancellor. The party guilty of such laches cannot screen his title from the just imputation of staleness merely by the allegation of an imaginary impediment or technical disability."

Wagner et al. v. Baird et al., 7 Howard 234, 258.

See also the following cases:

Badger v. Badger, 69 U. S. 87.

Hoyt v. Latham, 143 U. S. 553.

Foster v. Mansfield C. & L. M. R. Co., 146 U. S. 88.

Underwood v. Dugan, 139 U. S. 380.

Martin v. Gray, 142 U. S. 236.

Mackall v. Casilear, 137 U. S. 556.

Felix v. Patrick, 145 U. S. 317.

Hardt v. Heidweyer, 152 U. S. 547.

Wood v. Carpenter, 11 Otto 135, 143.

Hammond v. Hopkins, 143 U. S. 224, 274.
Starkweather v. Jenner, 216 U. S. 524.
Twin-Lick Oil Co. v. Marbury, 91 U. S. 587.
Kinder v. Scharff, 231 U. S. 517.

VI.

The appellant realty company and its grantors having a good legal title to this property for more than 7 years, during which it has paid all taxes legally assessed thereon, its title therefore is unassailable under Section 789 of Remington & Ballinger's Annotated Codes and Statutes of Washington.

§789 of Remington & Ballinger's Annotated Codes and Statutes of Washington reads as follows:

"Every person having color of title made in good faith to vacant and unoccupied land, who shall pay all taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land to the extent and according to the purport of his or her paper title. All persons holding under such tax payer, by purchase, devise or descent, before said seven years shall have expired, and who shall continue to pay the taxes as aforesaid, so as to complete the payment of said taxes for the term aforesaid, shall be entitled to the benefit of this section: Provided, however, if any person having a better paper title to said vacant and unoccupied land shall, during the said term of seven years, pay the taxes as assessed on said land for any one or more years of said term of seven years, then and in that case such taxpayer, his heirs or assigns, shall not be entitled to the benefit of this section."

There has been no question raised about the defendants having complied with the foregoing statute in so far as the payment of taxes for 7 successive years is concerned. (Tr. pp. 186 and 187), the only question raised being whether they had "color of title made in good faith." It is true that the title of these defendants was initiated by an assignment by Mr. Baker as receiver to Mr. Simpson of the state's contract of sale which was subject to the various attacks set up in this action. The Supreme Court of the State of Washington however has repeatedly held that a void deed is color of title.

Hoko River Boom Co. v. Fairservice, 69 Wash. 357.

Miller & Sons v. Simmons, 67 Wash. 294, 296.

Lara v. Sandell, 52 Wash. 53.

And even that a sale by a sheriff under a void foreclosure is a color of title.

Goetter v. Moore, 53 Wash. 5.

Oleson v. Howard, 38 Wash. 15.

Johnson v. Bartlett, 50 Wash. 114.

Philadelphia M. & T. Co. v. Palmer, 32 Wash. 455.

And "no rule is more firmly established than that this court will follow the construction given by the supreme court of a state to a statute of limitations of a state."

Dibble v. Bellingham Bay Land Co., 163 U. S. 63.

The only question remaining is as to the good faith of the defendants in asserting their claim to this property and in the payment of these taxes. The Supreme Court of the State of Washington has on several occasions refused to apply this statute to the special facts of the cases which were then before them because they found that the facts showed that the persons claiming under the statute could not have asserted title in good faith. For instance in *Seymour v. Dufur,* 53 Wash. 646,the person claiming the benefit of this statute had not paid the taxes in each successive year. In *McDowell v. Beckham,* 72 Wash. 224, the person against whom the claim of the statute was made was a remainder man whose right to the property was a matter of record. In *Petticrew v. Greenshields,* 61 Wash. 614, a person was claiming as color of title a quitclaim deed from a grantor that she knew had no title and which had been given but a short time before the beginning of the running of the 7 year statute. Under the circumstances of these various cases there can be no question but what the persons claiming the benefit of the statute could not have believed in good faith that they had title to the property. Good faith is a matter which must be determined in each case upon the facts in that case.

This suit was instituted in 1913. In 1906 when this 7 year period began to run, over 8 years had

elapsed since the assignment which is now called in question. The bank receivership had been closed for over 4 years and practically all of the receiver's records had been destroyed by the receiver for the purpose of being rid of them as a nuisance. (Tr. p. 172.) While the receivership was nominally being kept alive by the failure of the comptroller to accept the resignation of Mr. Frater, the then receiver, nevertheless the receiver had paid the final dividend, had closed up the estate and had accepted the office of Superior Court Judge. So far as could be seen it appeared like a moral certainty that the receivership and all matters connected therewith were matters of history.

Mr. Baker had already paid out close to $4,000. in the purchase price to the state and to Mr. Simpson and for taxes. Even though the assignment from Mr. Baker as receiver to Simpson was subject to attack and even if we concede, which we do not, that Mr. Baker at this time realized that it had been subject to attack when made, nevertheless we submit that viewing the facts and circumstances as they existed in 1906, which was the commencement of the 7 year period of limitations, any one would ordinarily believe that whatever was the weakness of the assignment made 8 years before, that matter was entirely a matter of the past acquiesced in by all concerned and the defendants were justified in assert-

ing their "color of title in good faith." There can be no question but what the defendants would have at any time been ready to defend this title as strenuously then as they have defended it in this action.

The only circumstances which the plaintiff can point to as evidence of the lack of good faith was that the patent from the state was taken in the name of Mr. Norton instead of Mr. Baker. If this was done in order to hide it from the creditors of the bank, why was it taken in the name of a man who had been an attorney of the receiver? As attorney for the receiver Mr. Norton was as much disqualified to take title to receivership assets as was the receiver himself. If any one familiar with the affairs of the estate had noticed that this title had been taken in the name of Mr. Norton it would have been as likely to arouse suspicions as if the title had been taken in the name of Mr. Baker. If Mr. Baker had desired to take this title in the name of a third party for the purpose of preventing creditors of the bank from noticing it, it was most certainly a very foolish thing to take it in the name of a man who had acted as attorney for both him and for Mr. Frater his successor when without doubt many men were available who had had no connection whatever with the receivership. The fact that the title was taken in Mr. Norton, instead of betraying a sense of guilt, shows that any connection with the former receivership

was a matter of indifference to them. Mr. Baker's explanation of the reason for taking the title in Mr. Norton's name, that he was expecting to take an extended trip to China, is not in conflict with any of the other evidence in this case and is an entirely reasonable explanation.

If this suit had been brought as a law action there would be no question about its bar by the statute of limitations. The action might have been brought as a law action.

Section 785 Remington & Ballinger's Codes & Statutes provides:

"Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the Superior Court of the proper county, to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title or some interest therein, and may have judgment in such action quieting or removing a cloud from plaintiff's title."

"While the primary object of the law as we find it in this chapter is to determine the question of title to the land, that question is to arise, we think, in litigation about the possession of the land. The action therein contemplated is the common-law action of ejectment, with the added incident of determining in the action the paramount, legal, or equitable title, and with the departure of permitting the action to be brought against one not in possession, but who claims title to or interest in the land.

"Its chief virtue is, that it makes the determination of title *res adjudicata*. The same result was obtained at common law by the action of trespass to try title, as it was called."

Smith v. Wingard, 3 Wash. Terr. 291.

Followed in:

Brown v. Baldwin, 46 Wash. 106.

Dueber v. Wolfe, 47 Wash. 634.

The District Court and the Circuit Court of Appeals found that the sale of the contract for this Block 430 to Simpson was made without legal authority in that it was not authorized by order of court, and that the transfer of the contract to Simpson was, therefore, void. Under the Washington practice, the fact that the deed issued in pursuance of the assignment ran to Norton, would not prevent the combined action of ejectment and quieting of title.

The statute of limitations cannot be defeated by asserting a concurrent remedy exclusively equitable in character. This is fundamental.

Godden v. Kimmell, 99 U. S. 201.

Metropolitan National Bank v. St. Louis Dispatch Company, 149 U. S. 436.

Baker v. Cummings, 169 U. S. 189.

VII.

Having in mind the rule that this court will not review controverted matters of fact, we have argued this case wholly from the viewpoint of legal questions. We contended in the courts below that Simpson was a bona fide purchaser of the tide land contract from Receiver Baker and Baker subsequently was a bona fide purchaser from Simpson. We think the contrary conclusion was erroneously reached.

The State accepted Simpson as assignee of the contract and conveyed to his assignee who in turn conveyed to defendant Seattle Waterfront Realty Company.

The State, by accepting the assignment to Simpson, made, in effect, a new contract enforcible in law and equity. The original contract with the trust was at an end. If Baker as Receiver had no authority to buy this property he could not create that right by a wrongful attempt and misapplication of trust funds. A property right must have some foundation recognized by law.

VIII.

HARBOR AREA LEASE 181

There is no evidence impugning the bona fides of Simpson's lease of the harbor area 181 and his sale of the lease to Baker at a price agreed upon without reference to the purchase of Tide Land block 430. (Tr. pp. 162-4.)

The decree of the District Court, affirmed by the Circuit Court of Appeals, requires the defendant to convey to the receiver, in connection with the tide land Block 430, the lease of the harbor area lying between the outer and inner harbor line in front of this block. These harbor areas are reserved by the state from sale, but for a period of 30 years from the date of platting, are subject to lease at an annual rental fixed by the Harbor Board. The owner of the abutting land, whether tide or upland, has the preference right to lease at the annual rental prescribed. Laws of Washington 1895, page 563.

Under this provision Simpson, after the assignment to him of the contract covering Block 430, leased this harbor area designated on the plats No. 181, for which lease he agreed to pay the State, during the 30 year term of the lease, the annual rental, and obliged himself to hold the property for public uses in trade and commerce.

It is difficult to see how a leasehold more foreign to the uses and purposes of a bank, or the uses and purposes of a receiver of an insolvent bank, can exist. The lease imposes not only the burden of paying money annually, but the burden of either directly or through tenants, subjecting the property to the uses of trade and commerce. It was suggested in oral argument in the court below that this lease made Block 430 more valuable because it afforded access from the sea. Would a bank be justified, under the law, in buying real estate whose only use is to make other speculative real estate more valuable, thereby encumbering its revenues for long years in the future?

CONCLUSION.

This case presents in concrete form the important question: Will a national bank be given the aid of the courts to speculate in real estate contrary to statute law? Putting it broadly, can a fiduciary person acquire for his estate, through his wrongful acts, property which the law forbids him to acquire by rightful acts?

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 133

CHARLES H. BAKER, ALGERNON S. NORTON, AND SEATTLE WATER FRONT REALTY COMPANY, APPELLANTS,

vs.

JOHN W. SCHOFIELD, AS RECEIVER OF THE MERCHANTS' NATIONAL BANK OF SEATTLE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

PRELIMINARY.

Both the District Court (212 Fed. 504) and the Circuit Court of Appeals (221 Fed. 322) have held Baker guilty not only of constructive fraud in secretly buying back for himself an asset during his trust, but of actual fraud in a sham sale for his own secret use to begin with. This they based on cross examination of defendant himself, on witnesses of high character, and on circumstances too glaring to be ignored.

Next, a point of law. To sell assets a national bank receiver must have not alone the Comptroller's permission, but the order of a court, yet Baker's only order was to sell personal property, which this asset under the local law never was. Consequently the property remained in the estate for want of an authorized sale, and Baker continuing through a corporation owned solely by himself the real owner and presumed in law to be cognizant from the first of his own official limitations, is unable to argue that his violation of statute should be regarded only as voidable error not binding upon a bona fide purchaser.

The opinion of the District Judge, we perceive, has never been brought up, for the memorandum one on page 73 of this record is not the final one rendered in that court. The full one (212 Fed. 504) goes into the facts as fully as does that of the intermediate court.

The present suit, though begun in the closing days of President Taft's administration, February 1913, has been continuously prosecuted by the succeeding Comptroller.

STATEMENT.

The very beginning of Baker's connection with his trust was bad, for though indebted to this small bank on a note for $10,000.00, he was appointed its receiver by Comptroller Eckles, a friend of Baker's rich father in Chicago. This occurred in 1895 over the protests of creditors (298-9). In January 1897 Baker reported to Eckles that a "valuable asset" (98) of the estate was its preference right as upland owner to buy on contract by installments various blocks of State tide lands, including twelve acres constituting a certain Block 430 on the edge of the harbor of Seattle. The Comptroller immediately gave him authority (99) for the contracts upon which Baker then made the initial payments with receivership funds (23, 191) and listed the contract as "additional assets, good" (288).

During the following July Alaskan discoveries so advanced prosperity in Seattle (289-90) that Baker in October draws the Comptroller's attention to a "very marked improvement" in business (101). Yet in the very next month this officer sells this "additional asset good" to an intimate (290) friend, Simpson, for just what or even less than what, as receiver he had paid the State a year and a half before (261, 295). In this sale to Simpson and at a corres-

ponding price, was another block, 429. The District Court found that there was a secret agreement with Simpson that 430 was to go back to Baker personally, and this the Circuit Court of Appeals quotes with approval.

Baker's right to sell at all was sought to be justified solely (120) on an order of the District Court which by its very language (19) authorized a sale of but "bad and doubtful assets" and of *personalty*, yet this property was, on his own reports, neither bad nor doubtful asset; and that it was real estate, the Supreme Court of the State had already decided in connection with precisely similar contracts. (Infra 28). Lastly Baker himself had listed this block for sale as real estate (224).

The Secrecy of Baker

That the sale of 430 to Simpson was a sham will be found as clear to this as to each of the lower courts, but passing that, we come to what he admits, a purchase back for himself during his term. In March 1899, while he was still receiver, he repurchased Block 430 from Simpson, not only at mere cost and interest, but also (though in the pleadings all secrecy was boldly denied) with a secrecy now admitted. It was on the stand that he confessed

this secrecy, claiming that he had used it merely against his own creditors, and not out of conscious bad motives in buying Block 430. Even on this excuse, though, his secrecy affects this case, for among his creditors was this very bank, which, it will be seen he finally eluded on the note by neither paying the obligation nor causing it to be adjudicated against him.

It was, he says, in March 1899 that he for the first time sought personal interest in this land. Simpson had been the *bona fide* owner of it, Baker would have us believe, for the year and a half preceding. He now relates that he bought it from Simpson on the mere basis of the latter's cost and interest, a reckoning being had as to what that amounted to. It came to less than $400.00 (284), yet simultaneously he was selling, as receiver, he again admits, adjacent, less valuable and contested tide land blocks at such advances in prices that this block, if he really was buying it from Simpson then, was on the basis of the others worth between twelve and thirty-six fold what he says Simpson was accepting for it! (284, 289, 290). Both courts have pointed out this circumstance as inexplicable on any honest basis. Moreover, he took from Simpson no transfer. Not even a memorandum passed between them. Simpson was still to hold in his own name.

With the change from Cleveland to McKinley there came in a new Comptroller, Dawes, insistent on Baker's paying the $10,000 note (302-3). Under the friendly Eckles the receiver had succeeded with excuses that he had "defenses" against this note, and when Eckles, embarrassed by the continued complaints of creditors, suggested that at least a testing of these defenses be had by a friendly suit, Baker avoided the test (299, 302-3), afterwards purging the trust by a pretended sale of his note and restoring it under Dawes only on adverse report by a special examiner (299-301). Dawes now insisted upon payment, whereupon Baker resigned in a highly dignified letter, which, considering his gross indelicacy in accepting the receivership, and of holding it while postponing his own debt so long, and of finally resigning without adjudicating his alleged defenses, must be reckoned a masterpiece (205) for in it he assumes, notwithstanding two years' argument with his superior officers, in which they had all asserted the note to be a real debt (301), that Dawes' announcement that he must pay was a new position and that he resigns because "the note *now* becomes an asset of the trust." It never had been anything else.

It was in April, 1899, a month after the purchase back from Simpson, that Baker resigned, leaving, as we have stated, the title still in Simpson.

Six years passed without any transfer. Explaining that he continued to keep it in Simpson's name out of fear of his personal creditors, he does concede that by 1905 he had become completely out of debt (304) and apparently with substantial inheritance from his father (311). Yet even then, making a second or final settlement with Simpson, he has the latter convey not to him but to one Norton, an old college friend (174) in New York, whither he himself had removed (305). This Norton, who was Baker's private counsel in various enterprises and president of one of his companies after Baker got out of or had evaded his debts (174), gave him in the two following years two declarations of trust, which were kept off the records, a peculiarity explained by his saying that the property was kept in Norton's name because of Baker's intending himself to go to China. He did not go to China, though, and as to why ownership in himself with power of attorney left behind with Norton would not do as well, explanation was declined (306, 175). Thus years pass and on one excuse or another he refrains from public ownership. Later the State issued a patent. To Baker? No. To Norton.

Norton, getting patent by Simpson's assigning the State's contract to him, conveyed in 1907. To Baker? No. To appellee, the newly organized Seattle Water Front Realty Company, in exchange

for all that company's stock, which was thereupon issued to Norton and indorsed in blank to Baker, excepting a trifling per cent which went to Norton for his fees, and excepting a few shares to Baker's intimate friends (179). Six years pass between the incorporation of this company and the present suit, yet Baker at all times withheld his own name both from the list of incorporators and from the directorship though he owned nearly every share (307), another precaution of secrecy because the State law required the names of directors to be annually filed in a public office (Laws of '95, p. 355; Rem. & Bal. Code, 3691). Even in the list of stockholders he appears only for a small portion, the rest being kept in the name of Norton, except a small portion transferred to a trust company for Baker's wife, (Deft's. Ex. A-3) while all the books of the company not only were removed from Seattle on its organization in 1907, but have been kept in New York ever since (308). So great was the secrecy of Baker that one Hill, who was his employee during the receivership, and ever since an intimate friend, and who had known a great deal about this property while the two had it in charge, never in all his intercourse with Baker heard him mention that he had any interest whatever in it until after this suit was begun (239).

In a word, Baker was the owner for at least fourteen years, 1899 to 1913, without once having it in his own name or letting any one know of it, so that buyers of tide lands were in mystery as to its real ownership when, before the transfer to the Water Front Company, they would approach Simpson, the ostensible owner (332). Baker himself after 1899, at which date he now admits he did own the property, was approached by an intending purchaser, who has testified in this case. That purchaser he referred to Simpson without discussing the thing (330).

As for Norton, he confessed the secrecy of Baker (184). Nor was a single soul called by the latter to show that he had ever let anybody know of his having an interest during all these years. Indeed, his two lawyers, Brockett and one Hardin, who actually participated in these transactions, he avoided calling at all (post p. 24). On the other hand, every living witness has testified against him on every point concerning the fraudulent side of this business.

On the public records not only has Baker's name never appeared, but Simpson's also never did, except in the depths of the Land Office files at Olympia as the assignee of receiver Baker's contracts, the State's transfer first appearing in the records of King County (Seattle) in 1905, then

leaping, as we have seen, to Norton, of New York. Thus the severest scrutiny of the public records of King County at no time, however suspicious an investigator might have been, would not have disclosed the remotest connection of Charles H. Baker with a property, which he now says he has been owning all the fourteen years before this suit was brought. Patent, even, was never in Simpson's name. What the latter held was only Baker's assigned State contract, so when Baker in 1905, after eight years, decided to take the property out of Simpson's hands, a minimum of publicity was required. All that had to be done was to pay the remaining installments to the State through Simpson. This last was the course pursued. Simpson assigned the contract to Norton (111) while Baker gave Simpson's agent, one Reed, the money to reimburse him for past charges paid by Simpson on this property. What he gave Reed was a check, but it was payable not to the Land Office but to Reed (159) for the precise balance that Simpson had to pay the State Land Office then to get the patent (153). Reed happened to indorse this check to the Land Office instead of issuing his own (157, 159), and the most therefore that could in the remotest degree have Mr. Baker's name appear even in the Land Office files was the transitory passing of a check of his to one Reed. Baker manifestly never in-

tended the Land Office to see so much as his check, for knowing the precise amount to be paid to the Land Office, it was natural to have the check payable to the officer, yet he makes it payable to Reed. With similar caution, when he comes to local taxes, he makes the check payable to his lawyer Brockett, and not to the county treasurer (279). Here again the check is made out to Brockett down to a penny as to the amount of the taxes, and would naturally have been made payable to the County Treasurer. Brockett had the shrewdness not to endorse this check to the County Treasurer, but to issue his own (279, Deft's. Ex. A-10).

Active Concealment by Baker

Baker was secret, not only by silence but by concealment. Two things were actively concealed, one the sale *to* Simpson in 1897, the other the repurchase, as he called it, of his interest *from* Simpson in March 1899. The latter, if it ever occurred at all and was in truth the beginning of his purchase, he not only did not reveal to anybody, but confesses that he concealed with a motive for concealment, the avoidance of his creditors. On this last transaction, therefore, we shall not enlarge.

Returning to the beginning, the sale *to* Simpson in 1897, we find that to the best of his ability Baker

concealed it from the Department. He did indeed report it (without of course revealing what the lower courts have found, his interest in it), but he so reported it that it would probably not attract attention. This is matter of detail as follows. Having acquired the property, as we have seen, in the spring of '97, and selling it to Simpson November 29, 1897, he the next day itemized it in a *general* report (296, plaintiff's Ex. 9). But there is a peculiarity noticeable. When he had first reported his having bought this property for the estate, he had spoken of tide land *blocks*. When he reports the sale in a voluminous general report, he mentions no blocks but simply contracts by their numbers as contracts. This variation attracted the attention of the trial court (264, 297-8).

The new comptroller came in evidently distrustful of Baker, as appears in a number of places tedious to enumerate. One of his first acts was to request a detailed or *special* report of everything which Baker had done under the "Seeley order," the one in which the District Court had empowered Baker under Eckles to sell the bad and doubtful assets (129). Baker responded to this in a statement which distinctly does *not* reveal this sale, but leaves it out (130-133), yet as he bases his right to sell solely on that order, we can see no excuse, and none has ever been offered, for then omitting this item.

The Wing Examination. In 1898, while Baker was still receiver, and between the sale to Simpson and the repurchase, a special examiner was sent to Seattle on rumors of other bad conduct (267). Wing, the special examiner, it is said, ought to have discovered things. What things? The most that he could discover would be that Baker had made an ostensibly honest sale to Simpson of the tide lands. Not only had the repurchase not occurred, but that, when it did occur, was entirely secret. Not only is the Department not to be reproached with failure to detect after suspicion, but it is to be commended for investigation. If the sale to Simpson was valid in law and yet for the secret use of Baker, nothing was visible that could expose the fraud. If the sale was invalid in law, the mere failure of the examiner or the comptroller to object to it would not create a title to which statutory authority was necessary. There is, however, no evidence that the sale to Simpson, then a year or two past, was ever disclosed or even mentioned to the examiner.

After Baker passed out in 1899 and a new receiver, Frater, came in, the latter saw Baker frequently and discussed the affairs of the bank with him, and yet never had it revealed to him by Baker that he had any interest in this land (168).

The depositors of this bank received but 52% (172), and Baker, though "well fixed" (311) has

never so much as troubled himself even about his $10,000 note, which, being reckoned by his successor as worthless through Baker's appearing to have no property (168), was finally sold with other rubbish and bought in by a representative of Baker's father (305), though block 430 would have been sufficient to pay the note had it not been concealed from that successor and everybody else.

After Baker's resignation in 1899, the receiver became A. W. Frater, who held until February 1913. This suit was begun by the succeeding receiver, Schofield only a month after his appointment, on the allegation that Baker had sold Simpson Blocks 429 and 430 with an understanding at the outset that the latter piece was to be Baker's.

The Harbor Lease

A harbor area lease, also sought to be recovered, must be distinguished from the *tide land* blocks. The former space, appurtenant to the latter, is never sold by the state, only leased to the tide land buyer for wharfage approach. We mention this because the leasing of the harbor area was subsequent to the tide land contract and the dates might be confused. In reimbursing Simpson through Reed in 1905, Baker repaid his disbursements on the lease (154) and got through Simpson to Norton this appurtenance also.

The lands, receiving no improvement in Baker's hands, are vacant and unoccupied (185, 154) subject only to a lien by the State's contractor for a filling in progress during the trial. The lower courts gave Baker back his taxes paid, $10,977.13, with interest, but compelled him to surrender the property to the estate.

Baker's Self Contradictions

(a) *His first attempt to claim that he had no interest in this land until after his receivership.*

What the complaint charged Baker with was selling Simpson contracts for blocks 429 and 430 with an arrangement by which No. 430 was to be Baker's. We alleged nothing about a buying back. The purchase back was what he set up, but that this too was during the receivership he did not at first confess. On the contrary, he wished in his original answer to put the whole transaction later than the receivership, nor until he discovered our possession of his letter written on the railway (147, 381), did he change his answer to a partial confession, that this transaction had a beginning during his term. In the answer, not amended until the day of trial (295), we find now at the end of paragraph IV, this concession, "which purchase was agreed upon in the spring of 1899 and finally consummated in

1905." This admission was not there until the trial. As to the first answer, the status may be seen in his cross-examination:

"Q. I will read from the answer which says, before it was amended the day before yesterday, at the close of paragraph 4: 'Denies that this defendant as receiver or in any other capacity held the contract for the purchase of said tide land for his own use and benefit after the sale to Sol G. Simpson until after he repurchased said block from Sol G. Simpson in the *open market after the termination of his receivership.*' I am reading the answer now before your wise counsel here amended it a day or two ago. Your original answer says it was bought back in the open market. That is not true?

A. No.

Q. And that original answer says it was bought back *long after the expiration of the receivership,* doesn't it?

"A. I believe it does.

"Q. And that is not true either, is it?

"A. No.

"Q. That answer was drawn before you knew, I believe you said, about the existence of this railroad letter, Exhibit 12?

"A. Yes, it was." (291)

(b) *The allegation of "ordinary buyer."*

"Q. Continuing, Mr. Baker, on the matter of your answer, your answer in two or three places *denies* that you ever settled with Mr. Simpson for *any reimbursement* for any advances. You know that, don't you, you know your answer says that, don't you?

"A. I think it does.

"Q. In paragraph 5 it says: 'This defendant further *denies* that he from time to time or at all *advanced* the said Simpson or *reimbursed the said Simpson* for sums paid by him to the State of Washington on account of the purchase price of said block.' Is that true or is it not true?

"A. No, that is not right.

"Q. It is not true. Now, Mr. Baker, according to your stories, according to your testimony, both as to your settlement with Mr. Simpson in 1899 and your settlement in 1905, *you never dealt with him on any other basis than reimbursement for advances,* did you?

"A. Well the final consummation of the arrangement was an upset price which included the disbursements.

"Q. And then it is not true in your answer when you say, 'This defendant further *denies* that he from time to time or at all advanced the said Simpson or *reimbursed* the said Simpson for sums paid by him to the State of Washington on account of the purchase price of said Block?' That is not true then?

"A. That is not true.

"Q. Then when you came to 1905 you reimbursed him then for advances on Block 430, didn't you?

"A. I paid this price, which included all his advances and taxes and interest.

"Q. You settled with him on the score of advances made, didn't you?

"A. And including the tide land deeds.

"Q. But that has reference here to 'said block' in your answer, and yet you deny that you ever reimbursed him for it, is that true or not true, in 1905?

"A. It is not true.

"Q. There again you were ignorant of this blue letter written on the railroad when you told your counsel to file that answer.

"A. Yes.

"Q. In the letter of May 9, 1904, written on the railroad, you say, addressing Mr. Reed about Mr. Simpson: 'I asked him if he would take my note in settlement of advances he has made, together with the interest accrued thereon;' in the light of that letter you wish to say that that statement made in your answer is *untrue both as to 1899 and as to 1905, don't you?*

"A. Yes, sir, it is untrue." (291-293).

In a word, he had had two settlements with Simpson, in both of which mere reimbursements was the basis, yet he had boldly pleaded purchase "for a valuable consideration in the usual course of business." (26)

Moreover, the answer was deliberately prepared after conferences and after his counsel had inspected the Comptroller's files at Washington city. (285-6)

"Q. Well then your counsel stated it for you after conferences and after an examination of certain exhibits, that Mr. Simpson *never had held that in trust* for you, you know that, don't you?

"A. I think that is what the answer stated.

"Q. That answer is not true, is it?

"A. No, it is not.

"Q. As a matter of fact *you now admit* on the stand that he had held it for *six years in trust* for you *at least,* don't you?

"A. Yes." (287)

Six years in secret trust and yet a denial of any trust at any time! The witness made a feeble attempt to blame his counsel. No explanation was ever offered by them that they had misunderstood him, yet it cannot be doubted that they would have relieved him by accepting the blame if they had erred so grossly to his disadvantage. However, the whole thing becomes absurd, because Baker finally admitted a reason for its being kept in another's name, his avoiding his creditors (271). A man surely would have reason to remember a long trust founded on that.

We thus see that defendant, feeling that proofs must be lost to us through time, at first boldly attempted denials of any dealing whatever until after the receivership, that the present termination of paragraph IV is a new, enforced position, but even when forced to amend he forgot something which is still left in, for on page 25 of this record we find a flagrant contradiction of the new portion added to paragraph IV. This overlooked language is:

"*Denies* that he had *while receiver any agreement* with said Simpson, *secret or otherwise,* by virtue of which this defendant *was to become thereafter the owner* of said block, and that said Simpson held said block or the contract thereto subject to a secret trust or any trust, and *denies* that under *an agreement* with said Sol G. Simpson or at all *while receiver* this defendant *was to have* any interest in said contract or any of the lands described therein." (25)

It is not often, we think, that a defendant in equity presents so contradictory or evasive an answer. But more. The denial of secrecy contained in the foregoing quotation is also false. Referring to the "repurchase" of 1899 we find:

"Q. Next, Mr. Baker, what did Mr. Simpson give you as evidence that he had thus transferred back to you while receiver a title in that land?

"A. He did not give me anything.

"Q. Did he give you a scrap of paper?

"A. No, he did not.

"Q. He continued to hold it exactly as he had held it since 1897, didn't he, as far as the public record is concerned?

"A. Yes." (284)

(c) *"Valuable consideration" to Simpson.*

The complaint had directly charged Baker with furnishing Simpson the money for this purchase either out of his own or the estate's funds, and that the assignment later by Simpson was a nominal one (8). Here an innocent defendant would state positively what was paid but the answer is such as no court of equity can approve. He bought from Simpson, he pleaded, "for a valuable consideration in the usual course of business," and "for a full and valuable consideration paid by this defendant to Simpson from his own funds" (26-7). Not only did he subsequently confess, as we have seen, to a

course very much out of the order of business, but this answer designedly conceals the paltry actual consideration that did pass.

(d) *False Allegations about the value of Block 430.*

The answer boldly alleges in paragraph III (22) at least four falsehoods. *First,* that the Bank had no preference right at all to purchase tide lands, notwithstanding in his own letter to the Comptroller he says the bank had and should exercise that right, that the right was valuable, and that the Comptroller ought to authorize him to exercise it (98). *Second,* that the right to assign or sell the asset was limited in time. This is contradicted by the contract itself (107-8) and by this defendant's himself assigning it. *Third,* that the property was a desperate asset. This is contradicted by his own admissions on the stand that within a few months the Alaskan discoveries brought prosperity to Seattle, and that when he bought it back from Simpson a year and a half later, March 1899, he was able to sell adjacent, contested, and less valuable tide lands at greatly advanced figures. These falsehoods are bold and were evidently made in the belief that time would obscure the Department's proof against him.

"Q. Then came the Klondike excitement in July, 1897, didn't it?

"A. Yes.

"Q. Then you wrote a letter in October, 1897, to the Comptroller after the Klondike excitement, which letter you have heard read in evidence here, stating that things were going up generally and that there was going to be prosperity?

"A. Yes.

"Q. And it was after that that you sold it to your friend Simpson?

"A. It was.

"Q. Yet you kept the other assets and tide lands and within eighteen months you sold them for thousands of dollars?

"A. Yes.

"Q. And in 1899, when you bought back Block 430 from Mr. Simpson, while you were still receiver, you paid him for this large block of 12 acres only $300.00 and interest, and you sold the adjoining land which you were in litigation about, your mere contest interest in it, for a thousand dollars at least, didn't you?

"A. Yes.

"Q. And they were simultaneous transactions practically?

"A. About, yes." (289-290)

The *fourth* falsehood under this head is that, in defending the low purchase at $400.00, he tried to make out that that was the *value* of Block 430 (284). Now Block 430 was the most valuable that he had (117), so we may see what he got for some others. What he actually got from a purchaser even for contested interests in No. 431 was $1700 (329), a commission of $750 going to an intermediary, an-

other friend of Baker's, one Anderson (329, 290). Yet for No. 431 not one dollar had yet been paid the State, the $1750. paid for the contested privilege of its purchase representing a clear net increase in value. As for Block 430, within a year the buyer of the contested block, who wanted this one too, could get no better price on it through Simpson than $30,000! (331). The District Court found its value in March 1899 to be no less than $5000, and the testimony showed that its value was far in excess of the price for which it was "sold" to Simpson (119).

(e) *A peculiar form of denial.*

We had charged him with selling two blocks to Simpson on the understanding that he was to get back *one,* No. 430, but he traverses on the stand our allegation in a formal joint manner, under question *by his own counsel* (262):

"Q. At that time, Mr. Baker, and for a considerable time after that, did you have any reserve interest, in expectancy or actual, present or in expectancy, in those *two* contracts?

"A. I did not.

"Q. Did you at that time have any expectation of ever acquiring any interest in those *two* contracts?

"A. I did not."

We had never charged him with a reserved interest in two contracts. It is possible he pre-

ferred to have the question put to him in this way to preserve him from a charge of perjury should it be made out that he did have a reserved interest in one. This is the only denial ever made to our allegation.

(f) *"Lost Witnesses."*

While all living witnesses, Turner, (Simpson's associate in banking), Reed (Simpson's son-in-law and executor), Rotch (Simpson's bookkeeper), and Pigott, a tide land buyer, testified against Baker, he would have us believe that he has lost testimony by Simpson's death. This is absurd, for the findings of the lower courts are made against Baker upon his own narrative. He cannot in one breath confess what he has and yet say that Simpson, if alive, would tell a different story. We must assume that he would expect Simpson, if alive, to corroborate him, and if Simpson did, the latter would at least, then, say that during the receivership he sold back to the receiver valuable properties at mere cost and interest without a scrap of paper to attest it, and with an understanding to carry it indefinitely still in his name.

Moreover, this man does not call his own lawyers, conversant with various phases of this business. One of them is Mr. Hardin, whose connection with these affairs appears on pages 181, 305 and

208 of the record. On cross examination he is asked concerning Hardin (309):

"Q. He knew of your relations with Simpson, did he not?

"A. Yes.

"Q. He was your confidential attorney, was he not?

"A. Yes.

"Q. Have you asked him for his deposition to be taken in this case?

"A. No.

Brockett's connection will be found on pages 184, 308, 284, 253, and of Brockett he is asked (309):

"Q. Didn't you go to Mr. Brockett and tell him not to divulge any information?

"A. No.

"Q. Never wrote him any letter of that kind?

"A. *I don't think so.*

"Q. Will you swear to that?

"A. Yes.

"Q. This Mr. Brockett is the man who it was stated here by you closed the transaction with Mr. Simpson. Is that correct?

"A. Yes.

"Q. Have you subpoenaed Mr. Brockett to testify here to-day?

"A. No.

"Q. You know he is in this city, don't you?

"A. No, I don't.

"Q. You are willing if he is out of town, are you not?

"A. Yes.

"Q. Now, Mr. Baker, by the way, he was one of your confidential lawyers?

"A. Yes."

The authorities are clear that there is in a failure to call favorable witnesses a circumstance to be reckoned against the party who could call them. *Re Kellogg,* 113 Fed. 120, affirmed in 121 Fed. 333; *Joseph B. Thomas,* 81 Fed. 578; *Norguet vs. Paramount Mills,* 177 Fed. 970; *Cheny vs. Gleason,* 126 Mass. 166.

ARGUMENT.

1. THE SALE TO SIMPSON IN '97 WAS VOID.

2. EVEN IF GOOD IN LAW, IT WAS ACTUALLY FOR BAKER'S BENEFIT.

3. THE ALLEGED RE-PURCHASE BY BAKER IN '99 INURES TO THIS RECEIVERSHIP.

1. The Sale to Simpson in '97 was void in law.

This sale, the original to Simpson, even if bona fide, was void because the court's order (a) never authorized the sale of real estate, and (b) authorized the sale only of bad and doubtful assets.

First. Both the lower courts found that the order of court contemplated the sale only of personalty. No other conclusion was possible. If tide land contracts be, as we shall show and both the courts have found they are, real estate, then the sale had no order to support it. To what extent then is the order indispensable?

Rev. St. 5234 requires indeed the receiver to obey the orders of the Comptroller, but he cannot by that mere direction pass title:

"R. S. 5234. Such receiver under the direction of the Comptroller shall take possession * * * and upon the order of a court of record of competent jurisdiction may sell or compound all bad or doubtful assets, and on a like order may sell all the real and personal property of such association on such terms as the court shall direct."

This court has said in *Turner vs. Richardson,* 180 U. S. 87:

"The receiver (of an insolvent national bank) here could not sell the collateral in his hands without obtaining an order of a court of competent jurisdiction. This order must fix the terms of sale."

The authorities are overwhelming. *Richardson vs. Turner,* 28 So. 158 (La.); *Ellis vs. Little,* 27 Kans. 707; *Tourtelot vs. Booker,* 160 S. W. 293; *Bodwell vs. Rice,* 19 Wash. 146; *Wallace vs. Hood,* 89 Fed. 11; *In re Earl,* 92 Fed. 22.

Now, that the tide land contracts constituted real

estate even before patent, is not debatable under the decisions of the Washington courts.

It is enough to say that from the time of making these ten year contracts the purchaser goes into possession and that long before patent is either received or earned, expensive structures are often built upon these lands.

In a tide land case, *State vs. Superior Court,* 31 Wash. 445, the local Supreme Court held:

"Before the contract is executed by conveyance, the lands are devisable by the vendee and descendable to his heirs as real estate."

These doctrines are applied in eminent domain proceedings on tide lands. *State ex rel. Wilson vs. Gray's Harbor,* 60 Wash. 32. And in *Book vs. Thomas,* 61 Wash. 607, the preference right of the upland owner, it was distinctly held, descends to the heirs. To the same effect as the foregoing is *Washington Iron Works vs. King County,* 20 Wash. 150.

Second. In addition to this contract's not being personalty, it was not of the bad or doubtful class, to which again the order was restricted. We have already seen that Baker not only recommended this contract as valuable but that he listed it under "additional assets, good." Getting the contract from the State in the spring of '97, he tells the Comptroller in October that times had improved

in Seattle, and yet the very next month sells it to Simpson at less than he had paid the State.

Speaking now solely of the sale *to* Simpson in 1897 and not of the sale back to Baker in '99, it seems clear that it was wholly unauthorized. Baker in buying back from Simpson in '99 or 1905 is presumed to know the infirmities of that sale. The asset is accordingly in the trust at this date just as much as it was at the date of the pretended sale, unless there could be raised against the Department the statute of limitations. The equitable doctrine of laches clearly cannot apply even if the statute of limitations could (as to latter see post 33).

2. The '97 sale, even if good in law, was really made for Baker's own benefit.

This is a question of fact upon which both courts have found against Baker under testimony that seems to us overwhelming. This case was heard, too, after the present system of procedure had displaced that of depositions, the District Court having the advantage of seeing Baker and the other witnesses upon the stand.

3. Baker's alleged purchase in '99 inured in law to this estate.

Under the overwhelming proof and finding of a secret agreement in the sale to Simpson in '97, it is perhaps of little moment to consider his present

story that he first got his interest in the land in March '99. However, the defendant is at all times confronted with the court's right to take him at his own word, even if his explanation is improbable, contradictory, or fatal in law if true. He now concedes both in his amended pleadings and as a witness that while the repurchase from Simpson was not "consummated" until 1905, or considerably after his receivership, it was "arranged" in March '99 while he was receiver. From that time at least Simpson was to hold it in his name for Baker's use.

The authorities cited by the two lower courts are decisive that a trustee cannot buy from himself directly or indirectly, or buy back, during his term, unless all interested parties consent. Such a purchase is not only bad but it is presumptively bad. The burden of proof is not to be put upon the beneficiaries or *cestuis que trustent.* If the thing can be purged of wrongdoing, the burden is entirely upon the trustee. To give a presumption of validity would never do. The law says that the principal must not be put to such a burden. Not only must the agent not be tempted to do wrong, but no principal or beneficiary must be put in a situation where, being in doubt about his trustee's good faith, he must either accept the transfer or bring a lawsuit at great annoyance and with doubtful result.

Nor is the principle different if the agent, having sold to another in good faith to begin with, merely buys back. Even then the law must say the thing is void unless the beneficiaries consent to it. Otherwise there would again be put upon the beneficiaries of the trust an unfair burden. For instance, my agent has sold a piece of property to a third person. When he tells me of it I am not quite satisfied with the price, but still think it only an honest mistake. A little later I hear that he has purchased the property back from the vendee. Then I am suspicious, especially if he has bought it back at mere cost and interest. But even if he has bought it back at a fair price, I am not satisfied with his doing this kind of thing. I complain. His reply is to me. "The law being that I have a right to repurchase though still your agent, the presumptions are with me and you cannot win unless you prove a secret agreement in the original sale. Sue me." I for my part am helpless. What chance have I in such a lawsuit? To suppose that two men would make a secret agreement in the first sale, is to suppose that they would deny it. I must accordingly sue two persons who have every reason in the world to swear me out of court. I must contest not mere prices but secret holdings. In short, if it be on me that the burden of proof rests I must fail.

And in this illustration we are even supposing

that I did hear of the original sale to the vendee and did not try to set that aside. That circumstance is no argument against me. When I heard of the original sale to the vendee I had a right to suppose that my trustee was acting in good faith. It is when I hear of his repurchasing that my right to complain accrues, for it is this repurchase which throws a badge of fraud on the original transaction and makes me distrust what at first, even if the price seemed too low, might only have been a mistake in a fairly intended sale.

Lamentable indeed would be the situation of creditors and stockholders if receivers, trustees and administrators throughout this country, handling as they do, millions of dollars of securities, should have the privilege of buying back at mere cost and interest, or at all; still more lamentable if these receivers were to have the privilege not only of buying back but of keeping the repurchase secret and the burden be on the creditors to overthrow the thing.

It is not necessary to add anything further to the citations and reasonings of the lower court (382) on this head.

STATUTES OF LIMITATION.

If the '97 sale to Simpson was void, then not laches but only statutes of limitation can be considered.

If the sale to Simpson was void, then the asset never passed out of the trust. Laches can have no application and only those bars can be set up which legislatures have created for the repose of titles. Now the statutes invoked here are not those of open, notorious adverse possession, for Baker never had any possession or title in his own right, or his company any, until, as we have seen, 1907. Neither did title leave the State until 1905. However, if we should date back to 1905, when the State patent issued to Norton, only eight years elapsed before this suit. The ordinary adverse possession statute of Washington being ten years, the period is too brief. The defendants accordingly resort to two statutes of the State of Washington, which give title in seven years, but both these requiring both color of title and good faith, the two lower courts have agreed in holding them applicable in this litigation.

Rem. & Bal. Code, 788: "Every person in actual, open and notorious *possession* of lands or tenements under *claim and color* of title made in good faith, and who shall *for seven successive years continue in possession* and shall also during said time pay all taxes, etc."

Rem. & Bal. 789: "Every person having *color of title* made in *good faith*, to vacant and unoccupied land, and who shall pay all taxes legally assessed thereon for seven successive years."

While the seven years tax payment has been pleaded, no serious argument can be made that Baker could come within the requirements also of color of title and good faith. *Seymour vs. Dufur*, 53 Wash. 646; *McDowell vs. Buckham*, 72 Wash. 224; *Petticrew vs. Greenshields*, 61 Wash. 614; *Deffeback vs. Hawke*, 115 U. S. 392; *Lindt vs. Uihlein*, 89 N. W. 214.

LACHES.

(a) Until avowal or repudiation by the trustee, laches does not begin.

(b) Rule in "actual fraud."

(c) There are no prejudicial changes here.

(a)

Until avowal or repudiation by the trustee, laches does not begin.

Two things are apparent. First, as to his "repurchase" from Simpson, Baker neither in pleadings nor in proof has pretended that he advised anybody. Second, he *confesses* on the stand to six years *active* concealment between 1899 to 1905, while from the latter date to the beginning of this suit

proof was overwhelming of active concealment without his confession.

This is a fiduciary case, and a fiduciary must advise beneficiaries of his trafficking in the trust. Yet, as was said below, "we have searched the record in vain for testimony even of the slightest, tending in the remotest degree to show either actual knowledge or any channel leading to knowledge on the part of the plaintiff or his predecessors in office, or of the Comptroller, respecting the purchase by Baker of the contract covering the tide lands during the term of his receivership."

That time does not run in favor of a trustee's fraud until there is communicated to the beneficiary a repudiation of the trust, is too well known to require citation. *Speidel vs. Henrici,* 120 U. S. 377.

Even what occurred in 1905 means nothing against these beneficiaries. In that year the State conveyed to Norton, neither Baker's nor Simpson's name appearing in the public title, but even if these names had appeared, the registration would have conferred not even constructive notice upon the beneficiaries. The distinction between non-fiduciary and fiduciary cases in this respect will be found in the exhaustive note to 22 L. R. A. (N. S.) page 215. Thus in *Townsend vs. Vandewerker,* 160 U. S. 171, notwithstanding a delay of nine years after a deed of trust had been put of record showing dealings

by the trustees inconsistent with their obligation, laches was not computed, because the beneficiaries were excused from watching public records against their trustees.

This is not a creditor's suit, the pursuit of debtor's property by creditors into or through third persons, where nobody involved holds a fiduciary relation or has an obligation of candor. As for this court, it has never relaxed that obligation. Wherever it has raised laches against a beneficiary, it is laches *after* discovery and not laches *to* discover.

For instance, *Hammond vs. Hopkins,* 143 U. S. 224. There the court carefully says (p. 261) that the deeds by which the trustees purchased through one Chapman *showed on their face* that they were intended for the trustees themselves and were not deceptive, and more, "that *the purchase was openly announced in the family.*" It is from the latter period that laches was estimated. In *McIntire vs. Pryor,* 173 U. S. 38, the court speaks of the *Hammond* case and says:

> "*Hammond vs. Hopkins,* a leading case in this country, is not to the contrary. The transaction was open and well known to all the cestuis and was objected to by none of them."

Again take *Patterson vs. Hewitt,* 195 U. S. 309. The court on page 320 specifically notes the "open

refusal" of the trustee to recognize plaintiff's right, and the eight years' delay that it speaks of was a delay *after this refusal,* the court saying on page 321:

"The refusal of Hewitt to execute the deed, of which both the appellants had notice, was a distinct *repudiation of the trust, and opened the door to the defense of laches* * * * as there was no evidence that defendant had fraudulently concealed the facts and abundant proof that the facts were known."

There was also *Robertson vs. Chapman,* 152 U. S. 673, which our opponents attempted to make use of in the lower courts, but which both courts have pointed out as not sustaining them, for on page 683 of the Robertson case the Supreme Court pointed out that the defendant agent "did not intend to conceal * * * he notified the defendant."

Hayward vs. Bank, 96 U. S. 611, is another fiduciary case. On page 616 this court speaks of the plaintiff's complaining about the sale, but notes that "he was apparently advised of it and of the amount realized."

Badger vs. Badger, 2d Wallace 87, observes on page 93:

"The whole transaction was public and well known to the widow and heirs and their guardians."

In *Hoyt vs. Latham,* 143 U. S. 553, the trustee

Barney having purchased for himself, the court says (p. 569):

"There is absolutely nothing tending to show fraud or bad faith. * * * *Barney gave them* apparently *a satisfactory statement* of the facts, requesting only that a decision be made at once."

Felix vs. Patrick, 145 U. S. 317, must not be confused with fiduciary cases, though at first glance it might appear one. What occurred there was the stealing of the land scrip of an Indian woman, which scrip containing powers of attorney, passed into the hands of Patrick. Most distinctly does this court note (p. 329 of that opinion) that there was no previous relation between Patrick and the Indian woman, that the relation between them was not fiduciary, and that his interest was "antagonistic" to hers from the start. The court saying as to the lands that he wrongfully got:

"He did not take them under an express trust to hold them for her benefit, in which case lapse of time would be immaterial, but under an implied or constructive trust."

The implied trust being that of a meddler's misappropriation, this court found that a person in her situation must of course be held to diligence, and moreover the court noticed there was really no charge of concealment involved because the complaint in that case negatived its own allegations of concealment; for as to concealment "no acts of his are averred in the bill, and we are left to infer that

his concealment was that of mere silence, which is not enough." (p. 331). Silence alone, in a non-fiduciary, is not forbidden.

Norris vs. Haggen, 136 U. S. 386 is a fiduciary case, in which the court again draws attention to actual knowledge:

"The statement that the complainant had only come to a knowledge of the alleged fraud within a short time before the filing of the bill was shown by the statement *in the bill itself to be false* and that he had known of the alleged fraud fifteen years."

Our opponents seem to think that the very sale in '97 to Simpson should start laches, though that was apparently an honest sale of trust assets and more calculated to lull us asleep than to invite attack, a reasoning well answered by Judge Lurton in the 6th Circuit Court of Appeals, *Newman vs. Schwerin,* 109 Fed. 942. There S., under a written agreement with plaintiff, was to buy at a judicial sale and hold part in trust for plaintiff. The judicial sale did not occur, but S. had a corporation in which he owned part of the stock become the purchaser, concealing at the same time his own stock interest. Plaintiff even took her share of the proceeds of this sale; so S. argued, when she attacked it a year or more later, that she should be estopped for not having investigated the sale. She certainly knew there was a sale for she accepted some of the

proceeds, but Judge Lurton was clear that the sale would not make her suspicious:

"She had therefore a right to suppose that the trust agreement between herself and Schwerin had become null and void by the purchase of the property by a *third person.* It was Schwerin's duty to execute the trust according to its terms. If he bought the property for himself * * * it was his duty to have fully advised her, and she was under no duty, under the circumstances, to inquire before acting upon the truth of the assumptions of the decree of distribution. (2d Perry Trusts, Secs. 850-1."

In *Kilbourn vs. Sunderland,* 130 U. S. 505, the Supreme Court speaks of delays by complainants, notwithstanding suspicious facts were within their view.

"Reposing confidence in their agents, they may have neglected availing themselves of some sources of knowledge that they might have sought. The defendants cannot be allowed to say that the complainants ought to have suspected them and are chargeable with what they might have found out upon inquiry aroused by such suspicion."

A scandalous doctrine indeed if a fiduciary should thus be permitted to conceal from the beneficiaries their cause of action while at the same time reckoning time against them, and put himself in the position to claim that he bought for himself by creating evidence that he had sold to another. We can accordingly see nothing in the sale to Simpson in 1897 to reckon laches from.

Michoud vs. Girod, 4 How. 503, the famous leading case already cited, in which this court sustained the heirs' attack after twenty-seven years, sustains the doctrine that beneficiaries are not required to be suspicious, to act on strange circumstances, and to get into quarrels with their trustees under what might prove to be erroneous appearances, though the trustees had gone into open possession of the premises and some of them had died, and on page 560 the court distinctly mentions the suspicions which the heirs entertained of the executors.

And in *Oliver vs. Piatt,* 3 How. 333, a case of most ingenious fraud by trustees, the court says (p. 411):

"The mere lapse of time constitutes of itself no bar to the enforcement of a subsisting trust; *and time begins to run against a trust only from the time when it is openly disavowed by the trustee,* who insists upon an adverse right and interest, *which is fully and unequivocally made known* to the *cestui que trust.* Now, until 1831, no final overt act was done by Baum in violation of his duty as trustee; and the first and great breach of that duty, on his part, was the surrender of the certificates of the tracts to Oliver at different periods between 1828 and 1831. At what particular period the subsequent acts of Baum, Oliver, and Williams, became first known to the plaintiff and the other proprietors of the Piatt and Port Lawrence companies having the same interest, does not distinctly appear; but the facts could not have been fully known or understood until within a few years before the filing of the bill, and at most probably not exceeding eight or ten. That period, upon admitted principles, is far too

short to interpose any positive bar to relief in equity. There may have been an unjustifiable delay, and gross inattention on the part of some of the proprietors. But as against persons perfectly connusant of the trust it can furnish no ground for any denial of the relief which the case otherwise requires."

Pleading and Proof of Non-Knowledge

Confusing non-fiduciary with fiduciary cases our opponents pressed upon both the lower courts a certain rule of this court which perhaps is only a rule of pleading. In the creditors' suits of *Wood vs. Carpenter,* 101 U. S. 135; *Hardt vs. Heidweyer,* 152 U. S. 547; *Foster vs. Mansfield R. Co.,* 146 U. S. 88, and some others, this court has ruled that it is the duty of the pleader to show in the bill when he first acquired knowledge. Now the slightest reflection shows that this doctrine can have no application to fiduciary cases, for if it did apply, it would reverse the burden of proof. The lower courts apparently took this view, which we do not find again asserted in the brief before us.

In non-fiduciary cases the defendant owes nothing to the plaintiff. Every act of his is hostile to the other. In those, even if he has not the right of active concealment (a disputed question), he does have the right of silence. Consequently time is always presumed to be running against the plaintiff

from the very date of any transaction of which he complains, and, as is said, it is easy for the plaintiff to state when he first got knowledge and correspondingly difficult for the defendant.

To fiduciary cases these principles can have no just application. As the fiduciary has an obligation to avow, it is not difficult for him to state when he avowed. The burden of proof has never been upon defendant's beneficiaries, who are not presumed to have been neglecting anything until notice has been brought home to them. We know of no fiduciary case in which this court has placed the burden in this respect upon plaintiff and we do find others in which you have placed it on defendant. Thus, in *Pence vs. Langdon,* 99 U. S. 578, where one Langdon of Minnesota bought mining stock in San Francisco through Pence, this court, having determined (p. 580) that "the letters show clearly the agency of Pence as claimed by Langdon," it was also said:

"The burden of proving knowledge of the fraud and the *time of its discovery* rests upon the defendant" (p. 582).

Yet the judges who thus put the burden of proof in that fiduciary case upon the defendant were the same set of judges who decided the non-fiduciary case of *Wood vs. Carpenter* but a year later. They were not at pains in the latter case to cite the *Pence* case, and there was no reason why they should have cited it.

And so in *Seymour vs. Freer,* 8 Wall. 202, this burden was again imposed on the defendants. Freer had become Seymour's agent to purchase land, the title going to Seymour, who was to have five years to make the sales before dividing the proceeds. "To this extent Seymour was the trustee and Freer the cestui." More than five years having passed and the property not being divided, Seymour died, whereupon the court had to consider three hypotheses as to what, if either of the parties were living, they might have testified to.

"The devisees (of the trustee Seymour) might have held the property and denied that under the circumstances the trust subsisted any longer. If Freer acquiesced, his rights would have been at an end.

"Freer might also have expressly or tacitly abandoned his claim. This would have worked the same result. * * *

"Both parties might have concluded to continue their existing relations and to wait for a more auspicious period. * * *

"The burden of proof as to the two former rests upon the appellants (the devisees of Seymour, the trustee)."

To the same effect are several State cases, while we find none at all to the contrary. *Anderson vs. Northrop,* 12 So. 318, Fla. (1892). Action against the executors of the executrix of estate of A. to compel accounting for property of A, who died in 1839 leaving his wife as executrix and life tenant, re-

mainder to plaintiffs. Among other fraudulent acts, the executrix in 1851 sold land of the estate, buying it herself through a third party. She died in 1881. This bill filed, 1882, thirty-one years after the fraud. Held: No laches since no notice of repudiation. The burden is on defendant to show time of discovery, citing numerous authorities.

Miles vs. Wheeler, 43 Ills. 123 (1867). Miles, administrator, sold real estate to himself through one A, the deed being given to A over a year after the sale and reconveyed the same day. Bill filed after 17 years. There was no evidence as to when knowledge came to plaintiffs. Held: Defendant, relying on lapse of time, must assume the burden of "showing notice to the *cestui que* trust, distinct information to him and acquiescence after that distinct information was communicated," quoting from *Randall vs. Irvington,* 10 Ves. 427.

This rule of *Wood vs. Carpenter,* is, probably, but a rule of pleading. It is difficult to find it applied to a case on final proof. It is in short a device of fairness to the defendant in non-fiduciary cases before he is put to the expense of laborious proof, for as plaintiff in non-fiduciary cases has on him a burden of investigation and must account for delay, he ought to be made to plead it. But, in a fiduciary case, suppose the pleader says nothing at

all as to when he got knowledge. Then suppose the defendant, not demurring, submits proof. Then suppose on the stand he confesses the fraud and the concealment. Lastly, suppose the case closes without testimony either way as to knowledge in the plaintiff. Can it be doubted that plaintiff should recover? To state it in another way, the wronged heir being asked when he got knowledge of the facts on which he founds his bill, replies that he never got them before the trial at all. He alleged them on deep suspicion which his own heart and mind told him were just but for which he had not a particle of legal proof. The defendant daring to take the stand breaks down and furnishes that proof. Is not justice attained?

Nay, more. Suppose in a trust case the wronged plaintiff does allege knowledge of recent date, when in fact he has no knowledge yet at all and only deep suspicions. Then suppose the case going to proof, defendant confesses both the fraud and the concealment, without proof on either side as to knowledge. Would any court then throw out the cheated heir or devisee simply because demurrer had been avoided by the allegation? Would not the court, rather, treat the complaint as a *bill of discovery*?

In *Bacon vs. Rives*, 106 U. S. 99, there was a

demurrer to a bill that alleged investments by decedent as plaintiff's agent twelve years before. The court on page 106 says:

"We cannot upon the case made by the bill fix the date. * * * Being called upon to execute what consistently with the facts as disclosed in the bill appears to be a subsisting trust, or if it had been in whole or in part executed, to disclose when and how it was so executed, he should not be permitted to take shelter behind a demurrer which relies simply upon the statutory limitations and confesses that he has kept his *cestuis que trustent* in ignorance of what it was his duty to communicate."

Evasive denials of the Allegations of Ignorance

We have never regarded it as necessary that a beneficiary plaintiff prove the date of his knowledge, so there is little cause to make him plead it, but the pleading here does for that matter assert that knowledge of Baker's wrongdoing was discovered by the Department only a few days before the appointment of the present receiver Schofield, and the commencement of this action. (12, 4). It is very doubtful indeed if the uncertain and evasive traverse of this allegation by the defendant Baker (30) amounts to any traverse at all. We may see its evasions as follows:

"Defendant denies that the purchase of said tide land block and said lease *(purchased by whom? Baker from the State? Simpson from Baker? Baker*

from Simpson? Norton from Simpson?) was without the knowledge of the Comptroller of the Currency, and that the assignment of the same *(Baker's assignment to Simpson or Simpson's to Norton at Baker's request?)* was made without the knowledge of the Comptroller of the Currency, but avers that the Comptroller of the Currency had full knowledge of the situation, both in law and fact, relating to the claim of said insolvent bank to the right to purchase said land, and that all the acts done and performed by this defendant pertaining to the same *(pertaining to Baker's buying the land from the State in the first instance?)* while this defendant remained receiver were with the full knowledge of said Comptroller and were done and performed with his approval."

Of course in this last the defendant does not mean that the Comptroller authorized him to buy back from Simpson in 1899. Neither pleading nor proof has ever pretended that.

To sum up. We have here actual fraud and admitted concealment of it. Active concealment by the fiduciary against one who has not the burden of inquiry or investigation, surely raises an additional presumption of non-knowledge. Surely the fiduciary must accept that situation under any rule.

Date of Our Acquiring Knowledge

Our bill alleges, though in this kind of case we hold it surplusage, that these frauds were unknown to us until 1913 (12), early in which year this suit was brought. As

to proof the receiver Frater who, succeeding Baker, served until just before this bill was filed, testifies that he never heard of Baker's interest in the property at any time though he had much to do with him about the trust's affairs (167-8). Though he was active in the trust only up to 1901 (168), and became a county judge, he actually was receiver until 1913 (166). The only period unaccounted for, then, is the month or two of receiver Schofield before the suit.

Thus with the burden of proof on Baker to begin with and our knowledge denied as to all but this trifling period, surely Baker has to explain.

And it is the ignorance or knowledge of the succeeding receiver and not of the comptroller that decides this question. It is he that binds the estate.

The receiver is "the owner of the title." *Bank vs. Colby,* 21 Wall. 609; *Scott vs. Armstrong,* 146 U. S. 499. He is the "statutory assignee." *Cockrill vs. Abales,* 86 Fed. 505; *Yardley vs. Clothier,* 51 Fed. 506. He represents "the bank, its creditors and shareholders and not the government." *Case vs. Terrell,* 11 Wall. 199, 202, and "under the direction" of the comptroller means merely subject to interference. *Turner vs. Richardson,* 180 U. S. 87. The comptroller is to the receiver what a court would be to one of its class of receivers. Notice

received by a judge would not be binding as knowledge in a receiver or administrator.

(b) Rule in "Actual Fraud."

The doctrine of laches is for the most part used by courts only in doubtful cases. Against proved actual fraud, as we shall see, it is only a bar where the notoriety of avowal is so great that non-action amounts to downright acquiescence, or where defendant has spent time and money on property *openly on the faith* of such notoriety, not in secret ownership.

Mere delay, of course, is not laches, the doctrine of which is based on a policy, first, to compensate for the loss of evidence in doubtful cases; second, to protect improvements made or sums spent in the belief that the other parties have abandoned their claims. As to the first, when a defendant as here confesses fraud, the court says: Is it you that complain of lost witnesses? This is absurd. It is plaintiff who has a grievance in that, for now that you have admitted the wrongdoing, it is clear he had a just case. You have had nothing to lose in witnesses. The death of these, if anything, has been of value to you, who now confess. Mere lapse of time you can not complain of. This was valuable rather than disadvantageous to you. It might have enabled you to escape. You almost did escape. Now that you

have confessed, it is the true owners who have been damaged by delay, not you.

Or is it money spent or improvements made that you complain of? Well, was this done while you were hiding your title? If so, you were then hiding the right of the other people to sue you, and presumptively they would have sued you, a fiduciary, if you had avowed the thing. You shall not improve people out of their property without their knowledge. Or lastly do you complain that the property has increased in value? Has it so increased since you avowed ownership, or while you concealed ownership? If you had been an honest man, you would never have had this property at all, or if you had not taken great pains to conceal your dishonesty, the other people presumptively would have taken it away from you before it got all this value.

In a word, when the truth is confessed or overwhelmingly proved by facts obviously not affected by time, rules intended to protect defendants in cases of doubt must give way.

So in *McIntire vs. Pryor,* 173 U. S. 38, the court says at p. 54:

"We have no desire to qualify in any way the long line of cases in this court, too numerous even for citation, in which we have held that where the fraud is constructive, or is proved by no conclusive testimony or by evidence falling short of conviction, and the property has greatly increased in value,

great diligence will be required in the assertion of plaintiff's rights. But these were all cases either of bills to establish a trust or open settled accounts, bills not involving fraud, or where the fraud was not clearly proved, or where with knowledge of the facts they had been deliberately acquiesced in; bills to impeach judicial proceedings, or where the property had passed into the hands of persons innocent of fraud or with no actual notice that a fraud had been committed.

"Granting all that may be fairly claimed in these cases, there is another class having a different bearing, in which it has been held that in cases of *actual fraud,* a delay even greater than that permitted by the statute of limitations was not fatal to the plaintiff's claim. The leading case is that of *Michoud vs. Girod,* 4 How. 503, which was a case of actual fraud committed by trustees of real estate against their *cestui que* trust. A bill filed thirty-six years after the commission of the fraud was held not to have been too late."

In the *Michoud* case a third person bought at a fairly conducted judicial sale. Later the executors repurchased. It was held that the price paid by the original purchaser was nominal. During the thirty-six years that passed sales of part of the property were had (p. 525). Toward the last the executors even went into possession (ib.) and the suit was brought against their *heirs.* Moreover, receipts and acquittances had been given by the heirs, who, it was conceded, had long been suspicious. But the court said:

"In a case of actual fraud, we believe no case can be found in the books in which a court of equity

has refused to grant relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or become known."

In the *McIntire* case the fraud was upon an ignorant person, but in *Saxlehner vs. Eisner Co.*, 179 U. S. 19, the court had to do with Saxlehner, a man of large business affairs in Hungary and accustomed to watch his rights in various countries. The court found that as to the name "Hunyadi," he had acquiesced, but as to the form of the label, notwithstanding the court conceded it to have been used ten years in the United States, it was said:

"But in all cases of *actual fraud, as we have repeatedly held,* notably in the recent case of *McIntire vs. Pryor,* 173 U. S. 38, *the principle of laches has but an imperfect application,* and delay even greater than that permitted by the statute of limitations is not fatal to plaintiff's claim. We have only to refer to the cases analyzed in that opinion for this distinguishing principle, that where actual fraud is proved, the court will look with much indulgence upon circumstances tending to excuse the plaintiff from a prompt assertion of his rights. *In the case of an active and continuing fraud like this,* we should be satisfied with no evidence of laches that did not amount to proof of assent or acquiescence."

In *Stanwood vs. Wishard,* 134 Fed. 959, Judge McPherson, citing the *Michoud* case and declining to apply to a fiduciary case the rule of the creditors' suits like *Wood vs. Carpenter,* says:

"The case of *McIntire vs. Pryor,* 173 U. S. 38,

collects the cases that conclude all discussion that as against an actual fraud and as against one perpetrating the fraud when acting in a representative and trust capacity, the period of the statute of limitations is largely if not wholly immaterial."

He speaks of "statute of limitations" but the suit was in equity and the defense laches, with the usual comparative doctrines invoked from the statute.

And so as to a confessing trustee it is probably immaterial how long there has been delay, for if he be still the owner and no third parties have become involved, he can never build up laches by time alone. In the present case the ingredients out of which laches is generally established are nearly all wanting, improvements, deaths affecting testimony or difficulty of accounting. Innocent purchasers is another ingredient, but we have here only a few scattered shareholders besides Baker and his wife. Nor can shareholders get a better title than their company, which in this instance gave no money for the asset and surely took with knowledge. *Wilson Coal Co. vs. U. S.*, 188 Fed. 545; *Linn & Lane Co. vs. U. S.*, 196 Fed. 593.

(c) There are no prejudicial changes here.

Mere delay, as is so often said, is not laches. Least of all does equity allow a knavish trustee,

conscious of his wrong, to improve his condition by mere lapse of time, occurring through his own concealment. Laches is such delay of course as has been acted upon by the person subsequently attacked, and so acted upon by him that he has changed his position and cannot fairly be restored to his former position. In non-fiduciary cases it means a failure of the complaining party to investigate, plus action by the defendant upon the property, in the belief that the other has acquiesced. In fiduciary cases laches is failure of the complaining party to act after notice fairly received, plus the altered conduct of the defendant just described.

The circumstances are five which the court reckons: improvements, deaths, innocent purchasers, difficulty of accounting, increase in value.

Let us look at these in the present case. *First, improvements.* There are none here. The land never arose above the tide until *during this suit,* when the State's contractor began the filling of it (185). In taxes only and in his payments to the Land Office has Baker spent anything, a few thousand dollars exactly estimated and exactly ordered refunded by the lower courts. This is not a case where stockholders have made heavy investments or where people have built homes or where defendant has expended the efforts of a lifetime.

Deaths. In nearly a third of the cases of concealed fraud, some party or other has meantime died. Thus in the *Saxlehner* case *supra,* it was uselessly urged that Saxlehner, if alive, would admit that he had never mentioned his adverse rights, nay, had refused personally to sue. In *Townsend vs. Vanderwerker supra,* a party to the very agreement was dead. "Only a circumstance," says the Supreme Court, "not a controlling thing." In the *Michoud* case deaths were numerous and conspicuous. In *Seymour vs. Freer,* 8 Wallace, *supra,* both parties had long been dead. In *Bacon vs. Rives,* 106 U. S. 99, *supra,* the trustee himself had long before passed away.

It is noticeable here that numerous living persons testify positively against Baker, that he does not call certain other living persons who like his own attorneys were friendly to him, and lastly that Simpson, if alive, could not tell a story that would acquit Baker without contradicting Baker, who has confessed this fraud. And what a sorry figure would Simpson make in reply to the court's question: "You bought the asset from Baker both below the fair market estimate and below what the receiver had actually paid, then sold it back while he was still receiver at mere cost and interest, notwithstanding the rise in value, and finally agreed

to carry it in secret for him when that officer was indebted to the trust itself on his promissory note?"

Innocent Purchasers. The distribution of stock is seen of record (179, 180). Surely Norton will not be deemed innocent when his 3% holding is acquired merely for services in this very sculduggery. The few who received presents of from one to five shares each took without consideration. Only the divorced wife could make any pretense of innocent interest in this stock, but she was not a purchaser for value nor has she chosen to interpose in this suit, and it is plain that she is secured by other collateral, the stock not being made over to her in her own right but only to a trust company. Apparently she too felt it wise to keep out of this case lest, if made a witness, she should be forced to admit cautions from her husband Baker that the less she said about this property the better. But whatever her reason, she is compelled like the other shareholders to accept her stock with whatever title the company itself has, and that title cannot be superior to the title of its fraudulent organizer. *Wilson Coal Co. vs. U. S.*, 188 Fed. 545; *Linn & Lane Co. vs. U. S.*, 196 Fed. 593.

Difficulty of Accounting. Never was a case so simple as this for an accounting, nothing having been spent upon the property except the taxes.

Books abound with far more complicated accountings in the adjustment of equities like these. *Michoud vs. Girod* is the most conspicuous.

Increase of Value. This is the last circumstance which equity ever considers to protect a fiduciary, for were this of itself to bar relief against him by those he has wronged, he would indeed have a premium for industrious concealment. *No case can be found* in which a court has allowed increase of value *alone* to decide this point. Search as one may, one will always find, along with increased value, one of the other four "altered conditions" added to this or else "doubtful proof," as where the court says in the case: "There are innocent purchasers here *and* the property has increased in value, etc.," or that proof is doubtful *and* or there are great improvements here *and* etc. No court has been bold enough in a fiduciary case to say: "Yes, you have defrauded these people, but the property has gone up so much in value that we shall let you keep it, though that is the only thing that has changed."

"NO POWER TO ACQUIRE BLOCK 430"

Our opponents argue that the bank and its receiver had no right to contract with the State for the purchase of these tide lands, on which account

the whole transaction was so *ultra vires* that even had Baker dealt fraudulently against his trust, he should be permitted now to keep these lands.

The court surely will not take kindly to this mode of escape. It was Baker himself who advised the comptroller not only that he had this right of purchase, but that it was a valuable asset. (98).

The objection is argued by our opponents on the ground that Baker entered into a contract rather than made a purchase, and that the contract obligated the receiver to do something that might survive his term. The objection is but academic, because as the original contract shows (bottom of 107), it is assignable, and so assignable that if the State accepts assignment it permits a novation, just as we see did occur in the assignment when it was actually made to Simpson (108-9). Baker even in recommending the contract to the comptroller mentions this assignability, which the comptroller noted when he ratified the contract, saying:

"Inasmuch as the contracts are assignable, they can no doubt be disposed of to advantage at any time should such a course seem advisable." (99)

Hence it is not worth while to argue what the legal status is of a contract by a receiver which, let us suppose, would obligate him to build a ten-story house and put on one story every year, a long course

of disbursement without relief or substitution. For not only was this contract assignable in terms with relief from obligation, but the testimony shows that it had a distinct value as property without regard to its unpaid balance.

However, the argument of our opponents seemed to be directed not so much against a receiver's having entered into a contract as against his having bought land. The thing was void, they argued, not so much because of his liabilities as because it was something which he could not hold.

Now, why not hold? If they argue that it was outside of his trust to buy real estate, then they must admit that if the receiver had a piece of property surrounded by other property which he did not own, and through which it was of vital importance to get a right of way, and if, as an incident of his existing ownership, the court gave him a right of purchase of the necessary right of way from the estate, he would have no right to buy it. Innumerable must be the occasions on which business prudence in a receivership will require the buying of some additional property. Thus a receiver of arid lands might find it necessary to carry out previous applications for the purchase of adjoining springs. To us it seems plain that the very nature of a tide land preference right makes its own argument here. It is a valuable

preference right, given by statute to the bank as an upland owner. Would you have a right to abandon it and not make anything out of it, even aside from the value given to the upland by the frontage? Our argument is that this was an occasion when the receiver had to decide, not whether he would acquire, but whether he would abandon an asset.

The general principles of estoppel apply here, for the contract was not only paid for in trust funds (admitted in the answer, 23) but was taken in the name of the Merchants' National Bank (104).

"Where a national bank, though restrained by statute not to acquire real estate, does acquire it, it is good against everybody except the government." *Union National Bank vs. Matthews,* 98 U. S. 621.

"And generally the doing of acts prohibited by the national banking act is, when done by them, good nevertheless until attacked by the government itself." *Thompson vs. St. Nicholas National Bank,* 146 U. S. 240. *Kerfoot vs. Farmers' & Merchants' Bank,* 218 U. S. 281.

See the cases cited under this head by the Circuit Court of Appeals in the present case.

"THIS PLAINTIFF NO POWER TO REIMBURSE BAKER"

It was argued that Baker ought to escape, even if guilty, on the ground that the existing receiver has no power to make him the reimbursement of taxes imposed by the lower court.

This is certainly an agreeable argument to wrongdoers. Many a receiver is in charge for the express purpose of pursuing such people, and yet has no immediate funds, while many a receiver who has handled considerable funds happens to be without them at the date when he discovers a fraud. In what way the wrongdoer is entitled to complain, we do not see. If he is adjudged not guilty of the wrong, he has been harmed only in a trifling degree by the privilege of suit. If on the other hand he is adjudged guilty, and yet the receiver afterwards cannot raise the money for reimbursement, the wrongdoer is luckier than ever to have been adjudged guilty and yet to have escaped.

We presume that no contest will be made against the legal status of the present receiver Schofield. The certificate of his appointment (97, Plff's Exhibit 1) is controlling. *Sanger vs. Upton*, 91 U. S. 56, 59; *Cadle vs. Baker*, 20 Wallace 650. Judge Frater never received any discharge, though he had years of inactivity during which he

was a local judge, and he only gave in his formal resignation just before this suit was commenced and Schofield appointed (166). The Department wisely refrains from granting formal discharges of these receivers, for additional assets often turn up in estates after long intervals (190). It is universal law that a receivership continues until formal discharge (*Alderson on Receivers,* 894 and 887; *High on Receivers,* 2d Ed. Sec. 834) just as in private estate the filing of final accounts by executors is not a termination in itself. 2 *Werner on Administration,* Sec. 572; *In re Estate of Hood,* 98 N. Y. 363; *Denny vs. Sayward,* 10 Wash. 422, 431; *Whetstone vs. McQueen,* 34 So. 229.

COMMENTS ON OPPONENT'S BRIEF

Our opponents' first point, that Receiver Baker and the bank had no right to buy the tide lands from the State.

What our opponents are confronted with here is that the bank before him, and Baker as receiver, did enter into these contracts and pay money to the State, and that Receiver Baker did acquire the asset for his trust with trust funds. What he is now arguing is that, having bought a thing unlawfully for his trust, he has a right to buy it for himself during his term by putting some of his own or

an intermediary's money in it also, and to say to his trust that it never had any interest in this property at all.

The reply of the lower courts to Baker has been that whether he or the trust had the right to buy the property from the State, it is not he that can keep it and say that when he used the trust's money to begin the purchase of that land he had no right to do so.

It is not upon mere ordinary estoppel of the participant that the lower courts have relied. They have said in effect that nobody but the government could raise an objection to this investment once exercised.

The Circuit Court of Appeals (373) quotes this court in *Thompson vs. St. Nicholas Bank*, 146 U. S. 240, as follows:

"It has been held repeatedly by this court that where the provisions of the National Banking Act prohibit certain acts of banks or their officers, without imposing any penalty or forfeiture applicable to the particular transactions which have been executed, their validity can be questioned *only by the United States* and not by private parties."

And again they quote this court in *Schuyler National Bank vs. Gadsden*, 191 U. S. 451:

"It is no longer open to controversy that the provisions of the statutes of the United States forbidding the taking of real estate security by a national bank for a debt coincidently contracted operate to make the security void and thus enable

the individual who has contracted with the bank to defeat recovery, but simply subject the bank to be called to an account *by the government* for exceeding its powers."

We do not see in what way Baker, a trustee taking advantage of his own wrong, can say that he is in a better position than one inducing a bank to lend him money and relying upon its *ultra vires* act to save him from repayment.

We have treated this subject already (ante p. 58), and we may rest answer to this point.

And as to the estate's right to buy the property, we see no merit in any of the arguments against it. The District Court, it seems to us, expressed the right of the estate or bank to buy these tide lands correctly when it said (212 Fed. at 510):

"The ownership of the upland carried with it a valuable privilege which was a part of and appurtenant to the upland, which passed to the bank at the time it acquired the upland, of which privilege the receiver could avail himself by making certain payments assessed by the State in the way of appraisals of the value of the land. Not only did the receiver have the power, under these sections of the Revised Statutes, to exercise this privilege and protect the security for which the upland was held by the bank, but it was his duty to do so."

We may compare the receiver's position as owner of the upland to that of a receiver who holds arid lands and wishes to acquire an appurtenant water privilege the preference right to purchase

which is given him by statute as an incident of the title which he holds, or to that of a receiver who, under similar circumstances, acquires a right of way which, if the receiver delayed in acquiring it, might pass to another person, leaving the estate's property without due access. We have said, in a word, that if the receiver had not exercised his right to buy these tide lands so cheaply offered him under salable contracts, he would have been guilty of negligence and waste, that he would in effect be letting valuable property get away from him. But, whether rightly or wrongly acquired, the contract was derived from the trust, and payments made upon it with trust moneys; and it thus partakes of a trust character which no act of Baker can change so long as he holds it or its proceeds.

Our opponents' second point that Baker is not estopped to plead ultra vires.

We think we have shown under the preceding head that nobody but the government can raise the question that the acquisition of these lands, as well as the sale of them, was *ultra vires.* Appellants' whole argument strikes us as utterly unconscionable, that this man can take advantage of his own wrong, and say that, because he had no right to acquire this property for his trust, he can, after he has acquired it at the cost of his trust, secretly divert

it to his own use, hold it as his individual property as against the trust whose money had gone into it. No court of equity can tolerate these things.

Our opponents' third point that Baker, the contract being ultra vires, was under no duty to carry it out.

How can such an argument be offered to a court? What our opponents have to answer here is not an attack made on a receiver for refusing to carry out something even after he had officially engaged to do it, nor even of responsibility for accidental loss of an asset that he ought not to have acquired, but his deliberately appropriating to himself the fruits of a trust investment and then setting up that he ought to be allowed to keep them for want of power in his trust to have gone on with the thing itself. Whether or not the asset could have been legally acquired, it was a listed asset of that estate. That it had a sale value is his own admission. He contends that he sold it to Simpson and that he now derives his title from Simpson. He committed, according to his present argument, a fraud in the ultra vires acquisition of the property for the estate and then a fraud in buying it back for his own use. It is not a question now of his powers but a question of the abuse of his powers, a question of his absolutely doing wrong in every way and profiting by it.

Our opponents' fourth point that we are without funds to reimburse him.

To this we have ourselves anticipated an answer under a separate head already, ante page 62.

Our opponents' sixth point, the statute of limitations.

This we have already discussed, ante page 33.

Our opponents' fifth point.

We deem it unnecessary to answer further the theory that Baker, after having begun the purchase of this property for his trust and out of trust funds, could make an illegal sale of it, and buying it back while he was still trustee, with knowledge of that illegality, win a good title over his trust by sheer lapse of time.

It is not Simpson who is raising, or ever did raise, this question. If even he could have won by years a right to close the department's mouth, surely Baker can not. His buying in the property for himself, when he ought to have attacked the illegal and improvident sale he had previously made to Simpson, was the committing of another wrong to his trust. Shall he make his first wrong more secure by doing another in his own interest? His repurchase during the term inured to the estate (supra, p. 29) and equity prevents the cheat.

The argument on laches we have answered, ante, page 34, where we have discussed the cases cited by our opponents on their page 47.

Respectfully submitted,

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